RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

As amended to January 1, 1977

AUTHORITY

The Rules of Civil Procedure hereinafter set out were promulgated by the Supreme Court of the United States under authority of former sections 723b, 723c (now § 2072) of this title.

EFFECTIVE DATE

The original Rules of Civil Procedure for the District Courts were transmitted to the Congress by the Attorney General on Jan. 3, 1938 and became effective on Sept. 16, 1938.

RULES OF THE SUPREME COURT OF THE UNITED STATES

Procedure in original actions in Supreme Court of the United States, Federal Rules of Civil Procedure as guide, see rule 9, this Appendix.

ANALYSIS OF RULES

Supplemental Rules for Certain Admiralty and Maritime Claims

The Federal Rules of Civil Procedure supplant the Equity Rules since in general they cover the field now covered by the Equlty Rules and the Conformity Act (former section 724 of this title).

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STATUTORY REFERENCE TABLE

This table shows the Constitution, its amendments, and the sections of the United States Code to which references are made in the Federal Rules of Civil Procedure and the notes thereto.

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RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

TITLE I—SCOPE OF RULES—ONE FORM OF ACTION

Rule 1. Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

1. Rule 81 states certain limitations in the application of these rules to enumerated special proceedings.

2. The expression "district courts of the United States" appearing in the statute authorizing the Supreme Court of the United States to promulgate rules of civil procedure does not include the district courts held in the Territories and insular possessions. See *Mookini et al.* v. *United States*, 303 U. S. 201, 58 S. Ct. 543, 82 L. Ed. 748 (1938).

3. These rules are drawn under the authority of the act of June 19, 1934, U.S.C., Title 28, formerly § 723b (now § 2072) (Rules in actions at law; Supreme Court authorized to make), and formerly § 723c (now § 2072) (Union of equity and action at law rules; power of Supreme Court) and also other grants of rule making power to the Court. See Clark and Moore, A New Federal Civil Procedure—I. The Background, 44 Yale L.J. 387, 391 (1935). Under former § 723b (now § 2072) after the rules have taken effect all laws in conflict therewith are of no further force or effect. In accordance with formerly § 723c (now § 2072) the Court has united the general rules prescribed for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both. See Ruie 2 (One Form of Action). For the former practice in equity and at law see U.S.C., Title 28, formerly §§ 723 and 730 (now §§ 2071-2073) (conferring power on the Supreme Court to make rules of practice in equity) and the former Equity Rules promulgated thereunder; U.S.C., Title 28, former § 724 (Conformity act): former Equity Rule 22 (Action at Law Erroneously Begun as Suit in Equity—Transfer); former Equity Rule 23 (Matters Ordinarily Determinable at Law When Arising in Sult in Equity to be Disposed of Therein); U.S.C., Title 28, former §§ 397 (Amendments to pleadings when case brought to wrong side of court), and 398 (Equitable defenses and equitable relief in actions at law).

4. With the second sentence compare U.S.C., Title 28, former §§ 777 (Defects of form; amendments), 767 (Amendment of process); former Equity Ruie 19 (Amendments Generally).

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

This is the fundamental change necessary to effect unification of the civil and admiralty procedure. Just as the 1938 rules abolished the distinction between actions at law and suits in equity, this change would abolish the distinction between civil actions and sults in admiralty. See also Ruie 81.

AMENDMENTS

1948—The amendment effective Oct. 20, 1949, substituted the words "United States district courts" for the words "district courts of the United States".

CROSS REFERENCES

Jurisdiction and venue as unaffected by these rules, see rule 82.

Puerto Rico, district court governed by the rules, see section 119 of this title.

Virgin Islands, district court governed by the rules, see section 1615 of Title 48, Territories and Insular Possessions.

Rule 2. One Form of Action

There shall be one form of action to be known as "civil action."

NOTES OF ADVISORY COMMITTEE ON RULES

1. This rule modifies U.S.C., Title 28, former § 384 (Suits in equity, when not sustainable). U.S.C., Title 28, formerly §§ 723 and 730 (now §§ 2071-2073) (conferring power on the Supreme Court to make rules of practice in equity), are unaffected insofar as they relate to the rule making power in admiralty. These sections, together with former § 723b (now § 2072) (Rules in actions at law; Supreme Court authorized to make) are continued insofar as they are not inconsistent with former § 723c (now § 2072) (Union of equity and action at law rules; power of Supreme Court). See Note 3 to Ruie 1. U.S.C., Title 28, former §§ 724 (Conformity act), 397 (Amendments to pleadings when case brought to wrong side of court) and 398 (Equitable defenses and equitable relief in actions at law) are superseded.

2. Reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules.

3. This rule follows in substance the usual introductory statements to code practices which provide for a singie action and mode of procedure, with abolition of forms of action and procedural distinctions. Representative statutes are N.Y. Code 1848 (Laws 1848, ch. 379) § 62; N.Y.C.P.A. (1937) § 8; Calif. Code Civ. Proc. (Deering, 1937) § 307; 2 Minn. Stat. (Mason, 1927) § 9164; 2 Wash. Rev. Stat. Ann. (Remington, 1932) §§ 153, 255.

CROSS REFERENCES

Injunctions, see rule 65.
Joinder of claims and remedies, see rule 18.
Receivers, see rule 66.

TITLE II—COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 3. Commencement of Action

A civil action is commenced by filing a complaint with the court.

NOTES OF ADVISORY COMMITTEE ON RULES

1. Rule 5(e) defines what constitutes filing with the court.

2. This rule governs the commencement of all actions, including those brought by or against the United States or an officer or agency thereof, regardless of whether service is to be made personally pursuant to Ruie 4(d), or otherwise pursuant to Ruie 4(e).

3. With this rule compare former Equity Ruie 12 (Issue of Subpoena—Time for Answer) and the following statutes (and other similar statutes) which provide a similar method for commencing an action:

U.S.C., Title 28 former:

§ 45 (District courts; practice and procedure in certain cases under interstate commerce laws).

§ 762 (Petition in suit against United States).

§ 766 (Partition suits where United States is tenant in common or joint tenant).

4. This rule provides that the first step in an action is the filing of the complaint. Under Rule 4(a) this is to be followed forthwith by issuance of a summons and its delivery to an officer for service. Other rules providing for dismissal for failure to prosecute suggest a method available to attack unreasonable delay in prosecuting an action after it has been commenced. When a Federal or State statute of limitations is pleaded as a defense, a question may arise under this

rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations. The requirement of Rule 4(a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising.

CROSS REFERENCES

Filing with the court defined, see rule 5.

Rule 4. Process

(a) Summons: issuance

Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

(b) Same: form

The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. When, under Rule 4(e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.

(c) By whom served

Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.

(d) Summons: personal service

The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(e) Same: service upon party not inhabitant of or found within the State

Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure

of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

(f) Territorial limits of effective service

All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.

(g) Return

The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or his deputy, he shall make affidavit thereof. Failure to make proof of service does not affect the validity of the service.

(h) Amendment

At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(i) Alternative provisions for service in a foreign country

(1) Manner

When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

(2) Return

Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). With the provision permitting additional summons upon request of the plaintiff compare former Equity Rule 14 (Alias Subpoena) and the last sentence of former Equity Rule 12 (Issue of Subpoena—Time for Answer).

Note to Subdivision (b). This rule prescribes a form of summons which follows substantially the requirements stated in former Equity Rules 12 (Issue of Subpoena—Time for Answer) and 7 (Process, Mesne and Final).

U.S.C., Title 28, former § 721 (now § 1691) (Sealing and testing of writs) is substantially continued insofar as it applies to a summons, but its requirements as to teste of process are superseded. U.S.C., Title 28, former § 722 (Teste of process, day of), is superseded.

See Rule 12(a) for a statement of the time within which the defendant is required to appear and defend.

Note to Subdivision (c). This rule does not affect U.S.C., Title 28, former § 503 (now § 547), as amended June 15, 1935 (Marshals; duties) and such statutes as the following insofar as they provide for service of process by a marshal, but modifies them insofar as they may imply service by a marshal only:

U.S.C., Title 15:
- § 5 (Bringing in additional parties) (Sherman Act)
- § 10 (Bringing in additional parties)
- § 25 (Restraining violations; procedure)

U.S.C., Title 28, former:
- § 45 (Practice and procedure in certain cases under the interstate commerce laws)

Compare former Equity Rule 15 (Process, by Whom Served).

Note to Subdivision (d). Under this rule the complaint must always be served with the summons.

Paragraph (1). For an example of a statute providing for service upon an agent of an individual see U.S.C., Title 28, former § 109 (now §§ 1400, 1694) (Patent cases).

Paragraph (3). This enumerates the officers and agents of a corporation or of a partnership or other unincorporated association upon whom service of process may be made, and permits service of process only upon the officers, managing or general agents, or agents authorized by appointment or by law, of the corporation, partnership or unincorporated association against which the action is brought. See *Christian* v. *International Ass'n of Machinists,* 7 F.(2d) 481 (D.C.Ky., 1925) and *Singleton* v. *Order of Railway Conductors of America,* 9 F.Supp. 417 (D.C.Ill., 1935). Compare *Operative Plasterers' and Cement Finishers' International Ass'n of the United States and Canada* v. *Case,* 93 F.(2d) 56 (App.D.C., 1937).

For a statute authorizing service upon a specified agent and requiring mailing to the defendant, see U.S.C., Title 6, § 7 (Surety companies as sureties; appointment of agents; service of process).

Paragraphs (4) and (5) provide a uniform and comprehensive method of service for all actions against the United States or an officer or agency thereof. For statutes providing for such service, see U.S.C., Title 7,

§§ 217 (Proceedings for suspension of orders), 499k (Injunctions; application of injunction laws governing orders of Interstate Commerce Commission), 608c(15)(B) (Court review of ruling of Secretary of Agriculture), and 855 (making § 608c(15)(B) applicable to orders of the Secretary of Agriculture as to handlers of anti-hog-cholera serum and hog-cholera virus); U.S.C., Title 26, § 3679 (Bill in chancery to clear title to realty on which the United States has a lien for taxes); U.S.C., Title 28, former § 45 (District Courts; practice and procedure in certain cases under the interstate commerce laws), former § 763 (Petition in suit against the United States; service; appearance by district attorney), former § 766 (now § 2409) (Partition suits where United States is tenant in common or joint tenant), former § 902 (now § 2410) (Foreclosure of mortgages or other liens on property in which the United States has an interest). These and similar statutes are modified insofar as they prescribe a different method of service or dispense with the service of a summons.

For the former Equity Rule on service, see former Equity Rule 13 (Manner of Serving Subpoena).

Note to Subdivision (e). The provisions for the service of a summons or of notice or of an order in lieu of summons contained in U.S.C., Title 8, former § 465 (now § 1451) (Cancellation of certificates of citizenship fraudulently or illegally procured) (service by publication in accordance with State law); U.S.C., Title 28, former § 118 (now § 1655) (Absent defendants in suits to enforce liens); U.S.C., Title 35, former § 72a (Jurisdiction of District Court of United States for the District of Columbia in certain equity suits where adverse parties reside elsewhere) (service by publication against parties residing in foreign countries); U.S.C., Title 38, § 445 (Action against the United States on a veteran's contract of insurance) (parties not inhabitants of or not found within the District may be served with an order of the court, personally or by publication) and similar statutes are continued by this rule. Title 24, § 378 of the Code of the District of Columbia (Publication against nonresident; those absent for six months; unknown heirs or devisees; for divorce or in rem; actual service beyond District) is continued by this rule.

Note to Subdivision (f). This rule eniarges to some extent the present rule as to where service may be made. It does not, however, eniarge the jurisdiction of the district courts.

U.S.C., Title 28, former § 113 (now § 1392) (Suits in States containing more than one district) (where there are two or more defendants residing in different districts), former § 115 (Suits of a local nature), former § 116 (now § 1392) (Property in different districts in same State), former § 838 (Executions run in all districts of State); U.S.C., Title 47, § 13 (Action for damages against a railroad or telegraph company whose officer or agent in control of a telegraph line refuses or fails to operate such line in a certain manner—"upon any agent of the company found in such state"); U.S.C., Title 49, § 321(c) (Requiring designation of a process agent by interstate motor carriers and in case of faliure so to do, service may be made upon any agent in the State) and similar statutes, allowing the running of process throughout a State, are substantially continued.

U.S.C., Title 15, §§ 5 (Bringing in additional parties) (Sherman Act), 25 (Restraining violations; procedure); U.S.C., Title 28, former § 44 (now § 2321) (Procedure in certain cases under interstate commerce laws; service of processes of court), former § 117 (now §§ 754, 1692) (Property in different States in same circuit; jurisdiction of receiver), former § 839 (now § 2413) (Executions; run in every State and Territory) and similar statutes, providing for the running of process beyond the territorial limits of a State, are expressly continued.

Note to Subdivision (g). With the second sentence compare former Equity Rule 15 (Process, by Whom Served).

Note to Subdivision (h). This rule substantially continues U.S.C., Title 28, former § 767 (Amendment of process).

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

Subdivision (b). Under amended subdivision (e) of this rule, an action may be commenced against a nonresident of the State in which the district court is held by complying with State procedures. Frequently the form of the summons or notice required in these cases by State law differs from the Federal form of summons described in present subdivision (b) and exemplified in Form 1. To avoid confusion, the amendment of subdivision (b) states that a form of summons or notice, corresponding "as nearly as many be" to the State form, shall be employed. See also a corresponding amendment of Rule 12(a) with regard to the time to answer.

Subdivision (d)(4). This paragraph, governing service upon the United States, is amended to allow the use of certified mail as an alternative to registered mail for sending copies of the papers to the Attorney General or to a United States officer or agency. Cf. N.J. Rule 4:5-2. See also the amendment of Rule 30(f)(1).

Subdivision (d)(7). Formerly a question was raised whether this paragraph, in the context of the rule as a whole, authorized service in original Federal actions pursuant to State statutes permitting service on a State official as a means of bringing a nonresident motorist defendant into court. It was argued in *McCoy* v. *Siler*, 205 F.2d 498, 501-2 (3d Cir.) (concurring opinion), cert. denied, 346 U.S. 872, 74 S.Ct. 120, 98 L.Ed. 380 (1953), that the effective service in those cases occurred not when the State official was served but when notice was given to the defendant outside the State, and that subdivision (f) (Territorial limits of effective service), as then worded, did not authorize out-of-State service. Thls contention found little support. A considerable number of cases held the service to be good, either by fixing upon the service on the official within the State as the effective service, thus satisfying the wording of subdivision (f) as it then stood, see *Holbrook* v. *Cafiero*, 18 F.R.D. 218 (D. Md. 1955); *Pasternack* v. *Dalo*, 17 F.R.D. 420; (W.D. Pa. 1955); cf. *Super Prods. Corp.* v. *Parkin*, 20 F.R.D. 377 (S.D.N.Y. 1957), or by reading paragraph (7) as not limited by subdivision (f). See *Griffin* v. *Ensign*, 234 F.2d 307 (3d Cir. 1956); 2 Moore's Federal Practice, ¶ 4.19 (2d ed. 1948); 1 Barron & Holtzoff, Federal Practice & Procedure § 182.1 (Wright ed. 1960); Comment, 27 U. of Chi.L.Rev. 751 (1960). See also *Olberding* v. *Illinois Central R.R.*, 201 F.2d 582 (6th Cir.), rev'd on other grounds, 346 U.S. 338, 74 S.Ct. 83, 98 L.Ed. 39 (1953); *Feinsinger* v. *Bard*, 195 F.2d 45 (7th Cir. 1952).

An important and growing class of State statutes base personal jurisdiction over nonresidents on the doing of acts or on other contacts within the State, and permit notice to be given the defendant outside the State without any requirement of service on a local State official. See, e.g., Ill.Ann.Stat. ch. 110, §§ 16, 17 (Smith-Hurd 1956); Wis.Stat. § 262.06 (1959). This service, employed in original Federal actions pursuant to paragraph (7), has also been held proper. See *Farr & Co.* v. *Cia. Intercontinental de Nav. de Cuba*, 243 F.2d 342 (2d Cir. 1957); *Kappus* v. *Western Hills Oil, Inc.*, 24 F.R.D. 123 (E.D.Wis. 1959); *Star* v. *Rogalny*, 162 F.Supp. 181 (E.D.Ill. 1957). It has also been held that the clause of paragraph (7) which permits service "in the manner prescribed by the law of the state," etc., is not limited by subdivision (c) requiring that service of all process be made by certain designated persons. See *Farr & Co.* v. *Cia. Intercontinental de Nav. de Cuba*, supra. But cf. *Sappia* v. *Lauro Lines*, 130 F.Supp. 810 (S.D.N.Y. 1955).

The salutary results of these cases are intended to be preserved. See paragraph (7), with a clarified reference to State law, and amended subdivisions (e) and (f).

Subdivision (e). For the general relation between subdivisions (d) and (e), see 2 Moore, supra, ¶ 4.32.

The amendment of the first sentence inserting the word "thereunder" supports the original intention that the "order of court" must be authorized by a specific United States statute. See 1 Barron & Holtzoff, supra, at 731. The clause added at the end of the first sentence expressly adopts the view taken by commentators that, if no manner of service is prescribed in the statute or order, the service may be made in a manner stated in Rule 4. See 2 Moore, supra, ¶ 4.32, at 1004; Smit, International Aspects of Federal Civil Procedure, 61 Colum. L. Rev. 1031, 1036-39 (1961). But see Commentary, 5 Fed. Rules Serv. 791 (1942).

Examples of the statutes to which the first sentence relates are 28 U.S.C. § 2361 (Interpleader; process and procedure); 28 U.S.C. § 1655 (Lien enforcement; absent defendants).

The second sentence, added by amendment, expressly allows resort in original Federal actions to the procedures provided by State law for effecting service on nonresident parties (as well as on domiciliaries not found within the State). See, as illustrative, the discussion under amended subdivision (d)(7) of service pursuant to State nonresident motorist statutes and other comparable State statutes. Of particular interest is the change brought about by the reference in this sentence to State procedures for commencing actions against nonresidents by attachment and the like, accompanied by notice. Although an action commenced in a State court by attachment may be removed to the Federal court if ordinary conditions for removal are satisfied, see 28 U.S.C. § 1450; *Rorick* v. *Devon Syndicate, Ltd.*, 307 U.S. 299, 59 S.Ct. 877, 83 L.Ed. 1303 (1939); *Clark* v. *Wells*, 203 U.S. 164, 27 S.Ct. 43, 51 L.Ed. 138 (1906), there has heretofore been no provision recognized by the courts for commencing an original Federal civil action by attachment. See Currie, Attachment and Garnishment in the Federal Courts, 59 Mich.L.Rev. 337 (1961), arguing that this result came about through historical anomaly. Rule 64, which refers to attachment, garnishment, and similar procedures under State law, furnishes only provisional remedies in actions otherwise validly commenced. See *Big Vein Coal Co.* v. *Read*, 229 U.S. 31, 33 S.Ct. 694, 57 L.Ed. 1953 (1913); *Davis* v. *Ensign-Bickford Co.*, 139 F.2d 624 (8th Cir. 1944); 7 Moore's Federal Practice ¶ 64.05 (2d ed. 1954); 3 Barron & Holtzoff, Federal Practice & Procedure § 1423 (Wright ed. 1958); but cf. Note, 13 So.Calif.L.Rev. 361 (1940). The amendment will now permit the institution of original Federal actions against nonresidents through the use of familiar State procedures by which property of these defendants is brought within the custody of the court and some appropriate service is made up them.

The necessity of satisfying subject-matter jurisdictional requirements and requirements of venue will limit the practical utilization of these methods of effecting service. Within those limits, however, there appears to be no reason for denying plaintiffs means of commencing actions in Federal courts which are generally available in the State courts. See 1 Barron & Holtzoff, supra, at 374-80; Nordbye, Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 18 F.R.D. 105, 106 (1956); Note, 34 Corn. L.Q. 103 (1948); Note, 13 So. Calif. L. Rev. 361 (1940).

If the circumstances of a particular case satisfy the applicable Federal law (first sentence of Rule 4(e), as amended) and the applicable State law (second sentence), the party seeking to make the service may proceed under the Federal or the State law, at his option.

See also amended Rule 13(a), and the Advisory Committee's Note thereto.

Subdivision (f). The first sentence is amended to assure the effectiveness of service outside the territorial limits of the State in all the cases in which any of the rules authorize service beyond those boundaries. Besides the preceding provisions of Rule 4, see Rule 71A(d)(3). In addition, the new second sentence of the subdivision permits effective service within a limited area outside the State in certain special situations, namely, to bring in additional parties to a counterclaim or cross-claim (Rule 13(h)), impleaded parties (Rule 14), and indispensable or conditionally necessary parties to a pending action (Rule 19); and to secure compliance with an order of commitment for civil contempt. In those situations effective service can be made at points not more than 100 miles distant from the courthouse in which the action is commenced, or to which it is assigned or transferred for trial.

The bringing in of parties under the 100-mile provision in the limited situations enumerated is designed to promote the objective of enabling the court to determine entire controversies. In the light of present-day facilities for communication and travel, the territorial range of the service allowed, analogous to that which applies to the service of a subpoena under Rule 45(e)(1), can hardly work hardship on the parties summoned. The provision will be especially useful in metropolitan areas spanning more than one State. Any requirements of subject-matter jurisdiction and venue will still have to be satisfied as to the parties brought in, altbough these requirements will be eased in some instances when the parties can be regarded as "ancillary." See *Pennsylvania R.R.* v. *Erie Avenue Warehouse Co.*, 5 F.R.Serv.2d 14a.62, Case 2 (3d Cir. 1962); *Dery* v. *Wyer*, 265 F.2d 804 (2d Cir. 1959); *United Artists Corp.* v. *Masterpiece Productions, Inc.*, 221 F.2d 213 (2d Cir. 1955); *Lesnik* v. *Public Industrials Corp.*, 144 F.2d 968 (2d Cir. 1944); *Vaughn* v. *Terminal Transp. Co.*, 162 F.Supp. 647 (E.D. Tenn. 1957); and compare the fifth paragraph of the Advisory Committee's Note to Rule 4(e), as amended. The amendment is but a moderate extension of the territorial reach of Federal process and has ample practical justification. See 2 Moore, supra. § 4.01[13] (Supp. 1960); 1 Barron & Holtzoff, supra, § 184; Note, 51 Nw.U.L.Rev. 354 (1956). But cf. Nordbye, Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 18 F.R.D. 105, 106 (1956).

As to tbe need for enlarging the territorial area in which orders of commitment for civil contempt may be served, see *Graber* v. *Graber*, 93 F.Supp. 281 (D.D.C. 1950); *Teele Soap Mfg. Co.* v. *Pine Tree Products Co., Inc.*, 8 F.Supp. 546 (D.N.H. 1934); *Mitchell* v. *Dexter*, 244 Fed. 926 (1st Cir. 1917); *in re Graves*, 29 Fed. 60 (N.D. Iowa 1886).

As to the Court's power to amend subdivisions (e) and (f) as here set forth, see *Mississippi Pub. Corp.* v. *Murphree*, 326 U.S. 438, 66 S.Ct. 242, 90 L.Ed. 185 (1946).

Subdivision (i). The continual increase of civil litigation having international elements makes it advisable to consolidate, amplify, and clarify the provisions governing service upon parties in foreign countries. See generally Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L.J. 515 (1953); Longley, Serving Process, Subpoenas and Other Documents in Foreign Territory, Proc. A.B.A., Sec. Int'l & Comp. L. 34 (1959); Smit International Aspects of Federal Civil Procedure, 61 Colum. L. Rev. 1031 (1961).

As indicated in the opening lines of new subdivision (i), referring to tbe provisions of subdivision (e), the authority for effecting foreign service must be found in a statute of the Unlted States or a statute or rule of court of the State in which the district court is held providing in terms or upon proper interpretation for service abroad upon persons not inhabitants of or found within the State. See tbe Advisory Committee's Note to amended Rule 4(d)(7) and Rule 4(e). For examples of Federal and State statutes expressly authorizing such service, see 8 U.S.C. § 1451(b); 35 U.S.C. §§ 146, 293; Me.Rev.Stat., ch. 22, § 70 (Supp. 1961); Minn.Stat.Ann. § 303.13 (1947); N.Y. Veh. & Tfc. Law § 253. Several decisions have construed statutes to permit service in foreign countries, although the matter is not expressly mentioned in the statutes. See, e.g., *Chapman* v. *Superior Court*, 162 Cal.App.2d 421, 328 P.2d 23 (Dist.Ct.App. 1958); *Sperry* v. *Fliegers*, 194 Misc. 438, 86 N.Y.S.2d 830 (Sup.Ct. 1949); *Ewing* v. *Thompson*, 233 N.C. 564, 65 S.E.2d 17 (1951); *Rushing*

v. *Bush*, 260 S.W.2d 900 (Tex.Ct.Civ.App. 1953). Federal and State statutes authorizing service on nonresidents in such terms as to warrant the interpretation that service abroad is permissible include 15 U.S.C. §§ 77v(a), 78aa, 79y; 28 U.S.C. § 1655; 38 U.S.C. § 784(a); Ill.Ann.Stat. ch. 110, §§ 16, 17 (Smith-Hurd 1956); Wis.Stat. § 262.06 (1959).

Under subdivisions (e) and (i), when authority to make foreign service is found in a Federal statute or statute or rule of court of a State, it is always sufficient to carry out the service in the manner indicated therein. Subdivision (i) introduces considerable further flexibility by permitting the foreign service and return thereof to be carried out in any of a number of other alternative ways that are also declared to be sufficient. Other aspects of foreign service continue to be governed by the other provisions of Rule 4. Thus, for example, subdivision (i) effects no change in the form of the summons, or the issuance of separate or additional summons, or the amendment of service.

Service of process beyond the territorial limits of the United States may involve difficulties not encountered in the case of domestic service. Service abroad may be considered by a foreign country to require the performance of judicial, and therefore "sovereign," acts within its territory, which that country may conceive to be offensive to its policy or contrary to its law. See Jones, supra, at 537. For example, a person not qualified to serve process according to the law of the foreign country may find himself subject to sanctions if he attempts service therein. See Inter-American Juridicial Committee, Report on Uniformity of Legislation on International Cooperation in Judicial Procedures 20 (1952). The enforcement of a judgment in the foreign country in which the service was made may be embarrassed or prevented if the service did not comport with the law of that country. See ibid.

One of the purposes of subdivision (i) is to allow accommodation to the policies and procedures of the foreign country. It is emphasized, however, that the attitudes of foreign countries vary considerably and that the question of recognition of United States judgments abroad is complex. Accordingly, if enforcement is to be sought in the country of service, the foreign law should be examined before a choice is made among the methods of service allowed by subdivision (i).

Subdivision (i)(1). Subparagraph (a) of paragraph (1), permitting service by the method prescribed by the law of the foreign country for service on a person in that country in a civil action in any of its courts of general jurisdiction, provides an alternative that is likely to create least objection in the place of service and also is likely to enhance the possibilities of securing ultimate enforcement of the judgment abroad. See Report on Uniformity of Legislation on International Cooperation in Judicial Procedures, supra.

In certain foreign countries service in aid of litigation pending in other countries can lawfully be accomplished only upon request to the foreign court, which in turn directs the service to be made. In many countries this has long been a customary way of accomplishing the service. See In re Letters Rogatory out of First Civil Court of City of Mexico, 261 Fed. 652 (S.D.N.Y. 1919); Jones, supra, at 543; Comment, 44 Colum. L. Rev. 72 (1944); Note, 58 Yale L.J. 1193 (1949). Subparagraph (B) of paragraph (1), referring to a letter rogatory, validates this method. A proviso, applicable to this subparagraph and the preceding one, requires, as a safeguard, that the service made shall be reasonably calculated to give actual notice of the proceedings to the party. See Milliken v. Meyer, 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278 (1940).

Subparagraph (C) of paragraph (1), permitting foreign service by personal delivery on individuals and corporations, partnerships, and associations, provides for a manner of service that is not only traditionally preferred, but also is most likely to lead to actual notice. Explicit provision for this manner of service was thought desirable because a number of Federal and State statutes permitting foreign service do not specifically provide for service by personal delivery abroad, see e.g., 35 U.S.C. §§ 146, 293; 46 U.S.C. § 1292; Calif. Ins. Code § 1612; N.Y. Veh. & Tfc. Law § 253, and it also may be unavailable under the law of the country in which the service is made.

Subparagraph (D) of paragraph (1), permitting service by certain types of mail, affords a manner of service that is inexpensive and expeditious, and requires a minimum of activity within the foreign country. Several statutes specifically provide for service in a foreign country by mail, e.g., Hawaii Rev.Laws §§ 2[illegible]-31, 230-32 (1955); Minn.Stat.Ann. § 303.13 (1947); N.Y.Civ.Prac.Act, § 229-b; N.Y.Veh. & Tfc.Law § 253, and it has been sanctioned by the courts even in the absence of statutory provision specifying that form of service. *Zurini* v. *United States*, 189 F.2d 722 (8th Cir. 1951); *United States* v. *Cardillo*, 135 F.Supp. 798 (W.D.Pa. 1955); *Autogiro Co.* v. *Kay Gyroplanes, Ltd.*, 55 F.Supp. 919 (D.D.C. 1944). Since the reliability of postal service may vary from country to country, service by mail is proper only when it is addressed to the party to be served and a form of mail requiring a signed receipt is used. An additional safeguard is provided by the requirement that the mailing be attended to be the clerk of the court. See also the provisions of paragraph (2) of this subdivision (i) regarding proof of service by mail.

Under the applicable law it may be necessary, when the defendant is an infant or incompetent person, to deliver the summons and complaint to a guardian, committee, or similar fiduciary. In such a case it would be advisable to make service under subparagraph (A), (B), or (E).

Subparagraph (E) of paragraph (1) adds flexibility by permitting the court by order to tailor the manner of service to fit the necessities of a particular case or the peculiar requirements of the law of the country in which the service is to be made. A similar provision appears in a number of statutes, e.g., 35 U.S.C. §§ 146, 293; 38 U.S.C. § 784(a); 46 U.S.C. § 1292.

The next-to-last sentence of paragraph (1) permits service under (C) and (E) to be made by any person who is not a party and is not less than 18 years of age or who is designated by court order or by the foreign court. Cf. Rule 45(c); N.Y. Civ. Prac. Act §§ 233, 235. This alternative increases the possibility that the plaintiff will be able to find a process server who can proceed unimpeded in the foreign country; it also may improve the chances of enforcing the judgment in the country of service. Especially is the alternative valuable when authority for the foreign service is found in a statute or rule of court that limits the group of eligible process servers to designated officials or special appointees who, because directly connected with another "sovereign," may be particularly offensive to the foreign country. See generally Smit, supra, at 1040-41. When recourse is had to subparagraph (A) or (B) the identity of the process server always will be determined by the law of the foreign country in which the service is made.

The last sentence of paragraph (1) sets forth an alternative manner for the issuance and transmission of the summons for service. After obtaining the summons from the clerk, the plaintiff must ascertain the best manner of delivering the summons and complaint to the person, court, or officer who will make the service. Thus the clerk is not burdened with the task of determining who is permitted to serve process under the law of a particular country or the appropriate governmental or nongovernmental channel for forwarding a letter rogatory. Under (D), however, the papers must always be posted by the clerk.

Subdivision (i)(2). When service is made in a foreign country, paragraph (2) permits methods for proof of service in addition to those prescribed by subdivision (g). Proof of service in accordance with the law of the foreign country is permitted because foreign process servers, unaccustomed to the form or the requirement of return of service prevalent in the United States, have on occasion been unwilling to execute the affidavit required by Rule 4(g). See *Jones, supra*, at 537;

Longley, supra, at 35. As a corollary of the alternate manner of service in subdivision (i)(1)(E), proof of service as directed by order of the court is permitted. The special provision for proof of service by mail is intended as an additional safeguard when that method is used. On the type of evidence of delivery that may be satisfactory to a court in lieu of a signed receipt, see *Aero Associates, Inc.* v. *La Metropolitana*, 183 F.Supp. 357 (S.D.N.Y. 1960).

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

The wording of Rule 4(f) is changed to accord with the amendment of Rule 13(h) referring to Rule 19 as amended.

CROSS REFERENCES

Actions on war risk insurance claims, see section 1292 of Title 46, Shipping.

Executions in favor of United States, see section 2413 of this title.

Motions to dismiss or quash for lack of jurisdiction over the person, insufficiency of process or service of process, see rule 12.

Process generally, see chapter 113 of this title.

Process in bankruptcy proceedings, see Rules of Bankruptcy Procedure, Appendix to Title 11, Bankruptcy.

Process to run outside state—

Actions under Security Act of 1933, see section 77v of Title 15, Commerce and Trade.

Actions under Security Exchange Act of 1934, see section 78aa of Title 15.

Veterans' actions against United States on life insurance contracts, see section 784 of Title 38, Veterans' Benefits.

Service of notice of application for leave to perpetuate testimony by taking deposition, see rule 27.

Venue of civil actions, see chapter 87 of this title.

FORMS

Motion to quash the return of service of summons, see form 19, Appendix of Forms.

Summons, see form 1.

Rule 5. Service and Filing of Pleadings and Other Papers

(a) Service: When required

Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Same: How made

Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(c) Same: Numerous defendants

In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing

All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

(e) Filing with the court defined

The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 30, 1970, eff. July 1, 1970.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivisions (a) and (b). Compare 2 Minn.Stat. (Mason, 1927) §§ 9240, 9241, 9242; N.Y.C.P.A. (1937) §§ 163, 164, and N.Y.R.C.P. (1937) Rules 20, 21; 2 Wash.Rev.Stat.Ann. (Remington, 1932) §§ 244-249.

Note to Subdivision (d). Compare the present practice under former Equity Rule 12 (Issue of Subpoena—Time for Answer).

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

The words "affected thereby," stricken out by the amendment, introduced a problem of interpretation. See 1 Barron & Holtzoff, Federal Practice & Procedure 760-61 (Wright ed. 1960). The amendment eliminates this difficulty and promotes full exchange of information among the parties by requiring service of papers on all the parties to the action, except as otherwise provided in the rules. See also subdivision (c) of Rule 5. So, for example, a third-party defendant is required to serve his answer to the third-party complaint not only upon the defendant but also upon the

plaintiff. See amended Form 22-A and the Advisory Committee's Note thereto.

As to the method of serving papers upon a party whose address is unknown, see Rule 5(b).

NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

The amendment makes clear that all papers relating to discovery which are required to be served on any party must be served on all parties, unless the court orders otherwise. The present language expressly includes notices and demands, but it is not explicit as to answers or responses as provided in Rules 33, 34, and 36. Discovery papers may be voluminous or the parties numerous, and the court is empowered to vary the requirement if in a given case it proves needlessly onerous.

In actions begun by seizure of property, service will at times have to be made before the absent owner of the property has filed an appearance. For example, a prompt deposition may be needed in a maritime action in rem. See Rules 30(a) and 30(b)(2) and the related notes. A provision is added authorizing service on the person having custody or possession of the property at the time of its seizure.

CROSS REFERENCES

Additional time for service by mail, see rule 6.

Jury trial, waiver by failing to file demand, see rule 38.

Rule 6. Time

(a) Computation

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) Enlargement

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

[(c) Rescinded. Feb. 28, 1966, eff. July 1, 1966]

(d) For motions—Affidavits

A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) Additional time after service by mail

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivisions (a) and (b). These are amplifications along lines common in state practices, of former Equity Rule 80 (Computation of Time—Sundays and Holidays) and of the provisions for enlargement of time found in former Equity Rules 8 (Enforcement of Final Decrees) and 16 (Defendant to Answer—Default—Decree Pro Confesso). See also Rule XIII, Rules and Forms in Criminal Cases, 292 U.S. 661, 666 (1934). Compare Ala.Code Ann. (Michie, 1928) § 13 and former Law Rule 8 of the Rules of the Supreme Court of the District of Columbia (1924), superseded in 1929 by Law Rule 8, Rules of the District Court of the United States for the District of Columbia (1937).

Note to Subdivision (c). This eliminates the difficulties caused by the expiration of terms of court. Such statutes as U.S.C. Title 28, former § 12 (Trials not discontinued by new term) are not affected. Compare Rules of the United States District Court of Minnesota, Rule 25 (Minn.Stat. (Mason, Supp. 1936), p. 1089).

Note to Subdivision (d). Compare 2 Minn.Stat. (Mason, 1927) § 9246; N.Y.R.C.P. (1937) Rules 60 and 64.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. Subdivision (b). The purpose of the amendment is to clarify the finality of judgments. Prior to the advent of the Federal Rules of Civil Procedure, the general rule that a court loses jurisdiction to disturb its judgments, upon the expiration of the term at which they were entered, had long been the classic device which (together with the statutory limits on the time for appeal) gave finality to judgments. See Note to Rule 73(a). Rule 6(c) abrogates that limit on judicial power. That limit was open to many objections, one of them being inequality of operation because, under it, the time for vacating a judgment rendered early in a term was much longer than for a judgment rendered near the end of the term.

The question to be met under Rule 6(b) is: how far should the desire to allow correction of judgments be allowed to postpone their finality? The rules contain a number of provisions permitting the vacation or modification of judgments on various grounds. Each of these rules contains express time limits on the motions for granting of relief. Rule 6(b) is a rule of general application giving wide discretion to the court to enlarge these time limits or revive them after they have

expired, the only exceptions stated in the original rule being a prohibition against enlarging the time specified in Rule 59(b) and (d) for making motions for or granting new trials, and a prohibition against enlarging the time fixed by law for taking an appeal. It should also be noted that Rule 6(b) itself contains no limitation of time within which the court may exercise its discretion, and since the expiration of the term does not end its power, there is now no time limit on the exercise of its discretion under Rule 6(b).

Decisions of lower federal courts suggest that some of the rules containing time limits which may be set aside under Rule 6(b) are Rules 25, 50(b), 52(b), 60(b), and 73(g).

In a number of cases the effect of Rule 6(b) on the time limitations of these rules has been considered. Certainly the rule is susceptible of the interpretation that the court is given the power in its discretion to relieve a party from failure to act within the times specified in any of these other rules, with only the exceptions stated in Rule 6(b), and in some cases the rule has been so construed.

With regard to Rule 25(a) for substitution, it was held in *Anderson* v. *Brady*, E.D.Ky. 1941, 1 F.R.D. 589, 4 Fed.Rules Service 25a.1, Case 1, and in *Anderson* v. *Yungkau*, C.C.A. 6th, 1946, 153 F.2d 685, cert. granted, 1946, 66 S.Ct. 1025, that under Rule 6(b) the court had no authority to allow substitution of parties after the expiration of the limit fixed in Rule 25(a).

As to Rules 50(b) for judgments notwithstanding the verdict and 52(b) for amendment of findings and vacation of judgment, it was recognized in *Leishman* v. *Associated Wholesale Electric Co.*, 1943, 318 U.S. 203, 63 S.Ct. 543, that Rule 6(b) allowed the district court to eularge the time to make a motion for amended findings and judgment beyond the limit expressly fixed in Rule 52(b). See *Coca-Cola* v. *Busch*, E.D.Pa. 1943, 7 Fed.Rules Service 59b.2, Case 4. Obviously, if the time limit in Rule 52(b) could be set aside under Rule 6(b), the time limit in Rule 50(b) for granting judgment notwithstanding the verdict (and thus vacating the judgment entered "forthwith" on the verdict) likewise could be set aside.

As to Rule 59 on motions for a new trial, it has been settled that the time limits in Rule 59(b) and (d) for making motions for or granting new trial could not be set aside under Rule 6(b), because Rule 6(b) expressly refers to Rule 59, and forbids it. See *Safeway Stores, Inc.* v. *Coe*, App.D.C. 1943, 78 U.S.App.D.C. 19, 136 F.2d 771; *Jusino* v. *Morales & Tio*, C.C.A. 1st, 1944, 139 F.2d 946; *Coca-Cola Co.* v. *Busch*, E.D.Pa. 1943, 7 Fed.Rules Service 59b.2, Case 4; *Peterson* v. *Chicago Great Western Ry. Co.*, D.Neb. 1943, 3 F.R.D. 346, 7 Fed.Rules Service 59b.2, Case 1; *Leishman* v. *Associated Wholesale Electric Co.*, 1943, 318 U.S. 203, 63 S.Ct. 543.

As to Rule 60(b) for relief from a judgment, it was held in *Schram* v. *O'Connor*, E.D.Mich. 1941, 5 Fed.Rules Serv. 6b.31, Case 1, 2, F.R.D. 192, s. c. 5 Fed.Rules Serv. 6b.31, Case 2, 2 F.R.D. 192, that the six-months time limit in original Rule 60(b) for making a motion for relief from a judgment for surprise, mistake, or excusable neglect could be set aside under Rule 6(b). The contrary result was reached in *Wallace* v. *United States*, C.C.A.2d, 1944, 142 F.2d 240, cert. den., 1944, 323 U.S. 712, 65 S.Ct. 37; *Reed* v. *South Atlantic Steamship Co. of Del.*, D.Del. 1942, 2 F.R.D. 475, 6 Fed.Rules Serv. 60b.31, Case 1.

As to Rule 73(g), fixing the time for docketing an appeal, it was held in *Ainsworth* v. *Gill Glass & Fixture Co.*, C.C.A.3d, 1939, 104 F.2d 83, that under Rule 6(b) the district court, upon motion made after the expiration of the forty-day period, stated in Rule 73(g), but before the expiration of the ninety-day period therein specified, could permit the docketing of the appeal on a showing of excusable neglect. The contrary was held in *Mutual Benefit Health & Accident Ass'n* v. *Snyder*, C.C.A. 6th, 1940, 109 F.2d 469 and in *Burke* v. *Canfield*, App.D.C. 1940, 72 App.D.C. 127, 111 F.2d 526.

The amendment of Rule 6(b) now proposed is based on the view that there should be a definite point where it can be said a judgment is final; that the right method of dealing with the problem is to list in Rule 6(b) the various other rules whose time limits may not be set aside, and then, if the time limit in any of those other rules is too short, to amend that other rule to give a longer time. The further argument is that Rule 6(c) abolished the long standing device to produce finality in judgments through expiration of the term, and since that limitation on the jurisdiction of courts to set aside their own judgments has been removed by Rule 6(c), some other limitation must be substituted or judgments never can be said to be final.

In this connection reference is made to the established rule that if a motion for new trial is seasonably made, the mere making or pendency of the motion destroys the finality of the judgment, and even though the motion is ultimately denied, the full time for appeal starts anew from the date of denial. Also, a motion to amend the findings under Rule 52(b) has the same effect on the time for appeal. *Leishman* v. *Associated Wholesale Electrie Co.*, 1943, 318 U.S. 203, 63 S.Ct. 543. By the same reasoning a motion for judgment under Rule 50(b), involving as it does the vacation of a judgment entered "forthwith" on the verdict (Rule 58), operates to postpone, until an order is made, the running of the time for appeal. The Committee believes that the abolition by Rule 6(c) of the old rule that a court's power over its judgments ends with the term, requires a substitute limitation, and that unless Rule 6(b) is amended to prevent enlargement of the times specified in Rules 50(b), 52(b) and 60(b), and the limitation as to Rule 59(b) and (d) is retained, no one can say when a judgment is final. This is also true with regard to proposed Rule 59(e), which authorizes a motion to alter or amend a judgment, hence that rule is aiso included in the enumeration in amended Rule 6(b). In consideration of the amendment, however, it should be noted that Rule 60(b) is also to be amended so as to lengthen the six-months period originally prescribed in that rule to one year.

As to Rule 25 on substitution, while finality is not involved, the limit there fixed should be controlling. That rule, as amended, gives the court power, upon showing of a reasonable excuse, to permit substitution after the expiration of the two-year period.

As to Rule 73(g), it is believed that the conflict in decisions should be resolved and not left to further litigation, and that the rule should be listed as one whose limitation may not be set aside under Rule 6(b).

As to Rule 59(c), fixing the time for serving affidavits on motion for new trial, it is believed that the court should have authority under Rule 6(b) to enlarge the time, because, once the motion for new trial is made, the judgment no longer has finality, and the extension of time for affidavits thus does not of itself disturb finality.

Other changes proposed in Rule 6(b) are merely clarifying and conforming. Thus "request" is substituted for "application" in clause (1) because an application is defined as a motion under Rule 7(b). The phrase "extend the time" is substituted for "eniarge the period" because the former is a more suitable expression and relates more clearly to both clauses (1) and (2). The final phrase in Rule 6(b), "or the period for taking an appeal as provided by law", is deleted and a reference to Rule 73(a) inserted, since it is proposed to state in that rule the time for appeal to a circuit court of appeals, which is the only appeal governed by the Federal Rules, and allows an extension of time. See Rule 72.

Subdivision (c). The purpose of this amendment is to prevent reliance upon the continued existence of a term as a source of power to disturb the finality of a judgment upon grounds other than those stated in these rules. See *Hill* v. *Hawes*, 1944, 320 U.S. 520, 64 S.Ct. 334; *Boaz* v. *Mutual Life Ins. Co. of New York*, C.C.A. 8th, 1944, 146 F.2d 321; *Bucy* v. *Nevada Construction Co.*, C.C.A. 9th, 1942, 125 F.2d 213.

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

Subdivision (a). This amendment is related to the amendment of Rule 77(c) changing the regulation of the days on which the clerk's office shall be open.

The wording of the first sentence of Rule 6(a) is clarified and the subdivision is made expressly applicable to computing periods of time set forth in local rules.

Saturday is to be treated in the same way as Sunday or a "legal holiday" in that it is not to be included when it falls on the last day of a computed period, nor counted as an intermediate day when the period is less than 7 days. "Legal holiday" is defined for purposes of this subdivision and amended Rule 77(c). Compare the definition of "holiday" in 11 U.S.C. § 1(18); also 5 U.S.C. § 86a; Executive Order No. 10358, "Observance of Holidays," June 9, 1952, 17 Fed. Reg. 5269. In the light of these changes the last sentence of the present subdivision, dealing with half holidays, is eliminated.

With Saturdays and State holidays made "dies non" in certain cases by the amended subdivision, computation of the usual 5-day notice of motion or the 2-day notice to dissolve or modify a temporary restraining order may work out so as to cause embarrassing delay in urgent cases. The delay can be obviated by applying to the court to shorten the time, see Rules 6(d) and 65(b).

Subdivision (b). The prohibition against extending the time for taking action under Rule 25 (Substitution of parties) is eliminated. The only limitation of time provided for in amended Rule 25 is the 90-day period following a suggestion upon the record of the death of a party within which to make a motion to substitute the proper parties for the deceased party. See Rule 25(a)(1), as amended, and the Advisory Committee's Note thereto. It is intended that the court shall have discretion to enlarge that period.

NOTES OF ADVISORY COMMITTEE ON 1968 AMENDMENT TO RULES

The amendment eliminates the references to Rule 73, which is to be abrogated.

P. L. 88-139, § 1, 77 Stat. 248, approved on October 16, 1963, amended 28 U.S.C. § 138 to read as follows: "The district court shall not hold formal terms." Thus Rule 6(c) is rendered unnecessary, and it is rescinded.

NOTES OF ADVISORY COMMITTEE ON 1971 AMENDMENT TO RULES

The amendment adds Columbus Day to the list of legal holidays to conform the subdivision to the Act of June 28, 1968, 82 Stat. 250, which constituted Columbus Day a legal holiday effective after January 1, 1971.

The Act, which amended Title 5, U.S.C., § 6103(a), changes the day on which certain holidays are to be observed. Washington's Birthday, Memorial Day and Veterans Day are to be observed on the third Monday in February, the last Monday in May and the fourth Monday in October, respectively, rather than, as heretofore, on February 22, May 30, and November 11, respectively. Columbus Day is to be observed on the second Monday in October. New Year's Day, Independence Day, Thanksgiving Day and Christmas continue to be observed on the traditional days.

CROSS REFERENCES

Answers and objections to admissions, see rule 36.
Answer to—
  Complaint, see rule 12.
  Cross-claim, see rule 12.
  Interrogatories, see rule 33.
Demand for jury trial, see rule 38.
Motion for—
  Amendment of findings, see rule 52.
  New trial, see rule 59.
  Relief from judgment or order, see rule 60.
Motion to—
  Alter or amend judgment, see rule 59.
  Set aside verdict and enter judgment, see rule 50.
Notice of appeal, see section 2107 of this title.
Objections to interrogatories, see rule 33.
Reply to counterclaim, see rule 12.
Service by mail complete upon mailing, see rule 5.
Substitution of parties, see rule 25.

TITLE III—PLEADINGS AND MOTIONS

Rule 7. Pleadings Allowed; Form of Motions

(a) Pleadings

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) Motions and other papers

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(c) Demurrers, pleas, etc., abolished

Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

1. A provision designating pleadings and defining a motion is common in the State practice acts. See Ill. Rev. Stat. (1937), ch. 110, § 156 (Designation and order of pleadings); 2 Minn. Stat. (Mason, 1927) § 9246 (Definition of motion); and N.Y.C.P.A. (1937) § 113 (Definition of motion). Former Equity Rules 18 (Pleadings—Technical Forms Abrogated), 29 (Defenses—How Presented), and 33 (Testing Sufficiency of Defense) abolished technical forms of pleading, demurrers, and pleas, and exceptions for insufficiency of an answer.

2. *Note to Subdivision (a).* This preserves the substance of former Equity Rule 31 (Reply—When Required—When Cause at Issue). Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 23, r.r. 1, 2 (Reply to counterclaim; amended, 1933, to be subject to the rules applicable to defenses, O. 21). See O. 21, r.r. 1-14; O. 27, r. 13 (When pleadings deemed denied and put in issue). Under the codes the pleadings are generally limited. A reply is sometimes required to an affirmative defense in the answer. 1 Colo.Stat.Ann. (1935) § 66; Ore.Code Ann. (1930) §§ 1-614, 1-616. In other jurisdictions no reply is necessary to an affirmative defense in the answer, but a reply may be ordered by the court. N.C.Code Ann. (1935) § 525; 1 S.D.Comp.Laws (1929) § 2357. A reply to a counterclaim is usually required. Ark.Civ.Code (Crawford, 1934) §§ 123-125; Wis.Stat. (1935) §§ 263.20, 263.21. U.S.C., Title 28, former § 45 (District courts; practice and procedure in certain cases) is modified insofar as it may dispense with a reply to a counterclaim.

For amendment of pleadings, see Rule 15 dealing with amended and supplemental pleadings.

3. All statutes which use the words "petition", "bill of complaint", "plea", "demurrer", and other such terminology are modified in form by this rule.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. This amendment [to subdivision (a)] eliminates any question as to whether the compulsory reply, where a counterclaim is pleaded, is a reply only to the counterclaim or is a general reply to the answer containing the counterclaim. The Commentary, Scope of Reply Where Defendant Has Pleaded Counterclaim, 1939, 1 Fed.Rules Serv. 672; *Fort Chartres and Ivy Landing Drainage and Levee District No. Five* v. *Thompson*, E.D.Ill. 1945, 8 Fed.Rules Serv. 13.32, Case 1.

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENTS TO RULES

Certain redundant words are eliminated and the subdivision is modified to reflect the amendment of Rule 14(a) which in certain cases eliminates the requirement of obtaining leave to bring in a third-party defendant.

CROSS REFERENCES

Procedure for motions in local practice, see rule 83.
Service and filing of pleadings and other papers, see rule 5.
Third party practice generally, see rule 14.
Time for service of—
Answer or reply, see rule 12.
Motions and affidavits, see rule 6.
Treating defenses as counterclaims, see rule 8.

RULES OF THE SUPREME COURT OF THE UNITED STATES

Form of motions in original actions in Supreme Court of the United States as governed by Federal Rules of Civil Procedure, see rule 9, this Appendix.

Rule 8. General Rules of Pleading

(a) Claims for relief

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) Defenses; form of denials

A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part of a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative defenses

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of failure to deny

Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be concise and direct; consistency

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of pleadings

All pleadings shall be so construed as to do substantial justice.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). See former Equity Rules 25 (Bill of Complaint—Contents), and 30 (Answer—Contents—Counterclaim). Compare 2 Ind.Stat.Ann. (Burns, 1933) §§ 2-1004, 2-1015; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11305, 11314; Utah Rev.Stat.Ann. (1933), §§ 104-7-2, 104-9-1.

See Rule 19(c) for the requirement of a statement in a claim for relief of the names of persons who ought to be parties and the reason for their omission.

See Rule 23(b) for particular requirements as to the complaint in a secondary action by shareholders.

Note to Subdivision (b). 1. This rule supersedes the methods of pleading prescribed in U.S.C., Title 19, § 508 (Persons making seizures pleading general issue and providing special matter); U.S.C., Title 35, former § 40d (Providing under general issue, upon notice, that a statement in application for an extended patent is not true), former § 69 (now § 282) (Pleading and proof in actions for infringement) and similar statutes.

2. This rule is, in part, former Equity Rule 30 (Answer—Contents—Counterclaim), with the matter on denials largely from the Connecticut practice. See Conn.Practice Book (1934) §§ 107, 108, and 122; Conn.Gen.Stat. (1930) §§ 5508-5514. Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r.r. 17-20.

Note to Subdivision (c). This follows substantially English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 15 and N.Y.C.P.A. (1937) § 242, with "surprise" omitted in this rule.

Note to Subdivision (d). The first sentence is similar to former Equity Rule 30 (Answer—Contents—Counterclaim). For the second sentence see former Equity Rule 31 (Reply—When Required—When Cause at Issue). This is similar to English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r.r. 13, 18; and to the practice in the States.

Note to Subdivision (e). This rule is an elaboration upon former Equity Rule 30 (Answer—Contents—Counterclaim), plus a statement of the actual practice under some codes. Compare also former Equity Rule 18 (Pleadings—Technical Forms Abrogated). See Clark, Code Pleading (1928), pp. 171-4, 432-5; Hankin, Alternative and Hypothetical Pleading (1924), 33 Yale L.J. 365.

Note to Subdivision (f). A provision of like import is of frequent occurrence in the codes. Ill.Rev.Stat. (1937) ch. 110, § 157(3); 2 Minn.Stat. (Mason, 1927) § 9266; N.Y.C.P.A. (1937) § 275; 2 N.D.Comp.Laws Ann. (1913) § 7458.

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

The change here is consistent with the broad purposes of unification.

CROSS REFERENCES

Amendment of pleadings generally, see rule 15.
Defenses in law or fact, how presented, see rule 12.
Joinder of claims, see rule 18.
Relief granted in judgment even if not demanded, see rule 54.
Reply to counterclaims denominated as such, see rule 7.

FORMS

See Appendix of Forms.

Rule 9. Pleading Special Matters

(a) Capacity

It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) Fraud, mistake, condition of the mind

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions precedent

In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official document or act

In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment

In pleading a judgment or decision of a domestic or foreign court, judicial or quasijudicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and place

For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special damage

When items of special damage are claimed, they shall be specifically stated.

(h) Admiralty and maritime claims

A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).

(As amended Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 30, 1970, eff. July 1, 1970.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). Compare former Equity Rule 25 (Bill of Complaint—Contents) requiring disability to be stated; Utah Rev.Stat.Ann. (1933) § 104-13-15, enumerating a number of situations where a general averment of capacity is sufficient. For provisions governing averment of incorporation, see 2 Minn.Stat. (Mason, 1927) § 9271; N.Y.R.C.P. (1937) Rule 93; 2 N.D.Comp.Laws Ann. (1913) § 7981 et seq.

Note to Subdivision (b). See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 22.

Note to Subdivision (c). The codes generally have this or a similar provision. See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 14; 2 Minn.Stat. (Mason, 1927) § 9273; N.Y.R.C.P. (1937) Rule 92; 2 N.D.Comp.Laws Ann. (1913) § 7461; 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 288.

Note to Subdivision (e). The rule expands the usual code provisions on pleading a judgment by including judgments or decisions of administrative tribunals and foreign courts. Compare Ark.Civ.Code (Crawford, 1934) § 141; 2 Minn.Stat. (Mason, 1927) § 9269; N.Y.R.C.P. (1937) Rule 95; 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 287.

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

Certain distinctive features of the admiralty practice must be preserved for what are now suits in admiralty. This raises the question: After unification, when a single form of action is established, how will the counterpart of the present suit in admiralty be identifiable? In part the question is easily answered. Some claims for relief can only be suits in admiralty, either because the admiralty jurisdiction is exclusive or because no nonmaritime ground of federal jurisdiction exists. Many claims, however, are cognizable by the district courts whether asserted in admiralty or in a civil action, assuming the existence of a nonmaritime ground of jurisdiction. Thus at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the saving-to-suitors clause (28 U.S.C. § 1333) or by equivalent statutory provisions. For example, a longshoreman's claim for personal injuries suffered by reason of the unseaworthiness of a vessel may be asserted in a suit in admiralty or, if diversity of citizenship exists, in a civil action. One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute.

It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. Similarly as will be more specifically noted below, there is no disposition to change the present law as to interlocutory appeals in admiralty, or as to the venue of suits in admiralty; and, of course, there is no disposition to inject into the civil practice as it now is the distinctively maritime remedies (maritime attachment and garnishment, actions in rem, possessory, petitory and partition actions and limitation of liability). The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty, where its character as such is not clear.

The problem is different from the similar one concerning the identification of claims that were formerly suits in equity. While that problem is not free from complexities, it is broadly true that the modern counterpart of the suit in equity is distinguishable from the former action at law by the character of the relief sought. This mode of identification is possible in only a limited category of admiralty cases. In large numbers of cases the relief sought in admiralty is simple money damages, indistinguishable from the remedy afforded by the common law. This is true, for example, in the case of the longshoreman's action for personal injuries stated above. After unification has abolished the distinction between civil actions and suits in admiralty, the complaint in such an action would be almost completely ambiguous as to the pleader's intentions regarding the procedure invoked. The allegation of diversity of citizenship might be regarded as a clue indicating an intention to proceed as at present under the saving-to-suitors clause; but this, too, would be ambiguous if there were also reference to the admiralty jurisdiction, and the pleader ought not be required to forego mention of all available jurisdictional grounds.

Other methods of solving the problem were carefully explored, but the Advisory Committee concluded that the preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim.

The choice made by the pleader in identifying or in failing to identify his claim as an admiralty or maritime claim is not an irrevocable election. The rule provides that the amendment of a pleading to add or withdraw an identifying statement is subject to the principles of Rule 15.

NOTES OF ADVISORY COMMITTEE ON 1968 AMENDMENT TO RULES

The amendment eliminates the reference to Rule 73 which is to be abrogated and transfers to Rule 9(h) the substance of Subsection (h) of Rule 73 which preserved the right to an interlocutory appeal in admiralty cases which is provided by 28 U.S.C. § 1292(a)(3).

NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

The reference to Rule 26(a) is deleted, in light of the transfer of that subdivision to Rule 30(a) and the elimination of the de bene esse procedure therefrom. See the Advisory Committee's note to Rule 30(a).

CROSS REFERENCES

Capacity to sue or be sued, see rule 17.
Pleading affirmative defenses, see rule 8.
Proof of official record, see rule 44.

Rule 10. Form of Pleadings

(a) Caption; names of parties

Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) Paragraphs; separate statements

All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by reference; exhibits

Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

NOTES OF ADVISORY COMMITTEE ON RULES

The first sentence is derived in part from the opening statement of former Equity Rule 25 (Bill of Complaint—Contents). The remainder of the rule is an expansion in conformity with usual state provisions. For numbered paragraphs and separate statements, see Conn.Gen.Stat. (1930) § 5513; Ill.Rev.Stat. (1937) ch. 110, § 157 (2); N.Y.R.C.P. (1937) Rule 90. For incorporation by reference, see N.Y.R.C.P. (1937) Rule 90. For written instruments as exhibits, see Ill.Rev.Stat. (1937) ch. 110, § 160.

CROSS REFERENCES

Captions in motions and other papers, see rule 7.

FORMS

See Appendix of Forms.

RULES OF THE SUPREME COURT OF THE UNITED STATES

Form of pleadings in original actions in Supreme Court of the United States as governed by Federal Rules of Civil Procedure, see rule 9, this Appendix.

Rule 11. Signing of Pleadings

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilfull violation of this rule an attorney may be subjected to appropriate disciplinary action. Similarly action may be taken if scandalous or indecent matter is inserted.

NOTES OF ADVISORY COMMITTEE ON RULES

This is substantially the content of former Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare former Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 4, and *Great Australian Gold Mining Co.* v. *Martin, L. R.*, 5 Ch.Div. 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn.Stat. (Mason, 1927) § 9265; N.Y.R.C.P. (1937) Rule 91; 2 N.D.Comp.Laws Ann. (1913) § 7455.

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as:

U.S.C., Title 28 former:

§ 381 (Preliminary injunctions and temporary restraining orders)

§ 762 (Suit against the United States).

U.S.C., Title 28, former § 829 (now § 1927) (Costs; attorney liable for, when) is unaffected by this rule.

For complaints which must be verified under these rules, see Rules 23(b) (Secondary Action by Shareholders) and 65 (Injunctions).

For abolition of the rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances, see Pa.Stat.Ann. (Purdon, 1931) see 12 P.S.Pa., § 1222; for the rule in equity itself, see *Greenfield* v. *Blumenthal*, 69 F.2d 294 (C.C.A. 3d, 1934).

CROSS REFERENCES

Notary public and other persons authorized to administer oaths required by laws of the United States, see section 2903 of Title 5, Government Organization and Employees.

Signing of motions and other papers, see rule 7.

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

(a) When presented

A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods to time as follows, unless a different time is fixed by order of the court: (1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How presented

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for judgment on the pleadings

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on

a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary hearings

The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for more definite statement

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to strike

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days, after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of defense in motion

A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or preservation of certain defenses

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). 1. Compare former Equity Rules 12 (Issue of Subpoena—Time for Answer) and 31 (Reply—When Required—When Cause at Issue); 4 Mont.Rev.Codes Ann. (1935) §§ 9107, 9158; N.Y.C.P.A. (1937) § 263; N.Y.R.C.P. (1937) Rules 109-111.

2. U.S.C., Title 28, former § 763 (now § 507) (Petition in action against United States; service; appearance by district attorney) provides that the United States as a defendant shall have 60 days within which to answer or otherwise defend. This and other statutes which provide 60 days for the United States or an officer or agency thereof to answer or otherwise defend are continued by this rule. Insofar as any statutes not excepted in Rule 81 provide a different time for a defendant to defend, such statutes are modified. See U.S.C., Title 28, former § 45 (District courts; practice and procedure in certain cases under the interstate commerce laws) (30 days).

3. Compare the last sentence of former Equity Rule 29 (Defenses—How Presented) and N.Y.C.P.A. (1937) § 283. See Rule 15(a) for time within which to plead to an amended pleading.

Note to Subdivisions (b) and (d). 1. See generally former Equity Rules 29 (Defenses—How Presented), 33 (Testing Sufficiency of Defense), 43 (Defect of Parties—Resisting Objection), and 44 (Defect of Parties—Tardy Objection); N.Y.C.P.A. (1937) §§ 277-280; N.Y.R.C.P. (1937) Rules 106-112; English Rules Under the Judicature Act (The Annual Practice, 1937) O. 25, r.r. 1-4; Clark, Code Pleading (1928) pp. 371-381.

2. For provisions authorizing defenses to be made in the answer or reply see English Rules Under the Judicature Act (The Annual Practice, 1937) O. 25, r.r. 1-4; 1 Miss.Code Ann. (1930) §§ 378, 379. Compare former Equity Rule 29 (Defenses—How Presented); U.S.C., Title 28, former § 45 (District Courts; practice and procedure in certain cases under the interstate commerce laws). U.S.C., Title 28, former § 45, substantially continued by this rule, provides: "No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed." Compare Calif.Code Civ.Proc. (Deering, 1937) § 433; 4 Nev.Comp.Laws (Hillyer, 1929) § 8600. For provisions that the defendant may demur and answer at the same time, see Calif.Code Civ.Proc. (Deering, 1937) § 431; 4 Nev.Comp.Laws (Hillyer, 1929) § 8598.

3. Former Equity Rule 29 (Defenses—How Presented) abolished demurrers and provided that defenses in point of law arising on the face of the bill should be made by motion to dismiss or in the answer, with further provision that every such point of law going to the whole or material part of the cause or causes stated might be called up and disposed of before final hearing "at the discretion of the court." Likewise many state practices have abolished the demurrer, or retain it only to attack substantial and not formal defects. See 6 Tenn.Code Ann. (Williams, 1934) § 8784; Ala.Code Ann. (Michie, 1928) § 9479; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, §§ 15-18; Kansas Gen.Stat.Ann. (1935) §§ 60-705, 60-706.

Note to Subdivision (c). Compare former Equity Rule 33 (Testing Sufficiency of Defense); N.Y.R.C.P. (1937) Rules 111 and 112.

Note to Subdivisions (e) and (f). Compare former Equity Rules 20 (Further and Particular Statement in

Pleading May Be Required) and 21 (Scandal and Impertinence); English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r.r. 7, 7a, 7b, 8; 4 Mont.Rev.Codes Ann. (1935) §§ 9166, 9167; N.Y.C.P.A. (1937) § 247; N.Y.R.C.P. (1937) Rules 103, 115, 116, 117; Wyo.Rev.Stat.Ann. (Courtright, 1931) §§ 89-1033, 89-1034.

Note to Subdivision (g). Compare Rules of the District Court of the United States for the District of Columbia (1937), Equity Rule 11; N.M. Rules of Pleading, Practice and Procedure, 38 N.M.Rep. vii [105-408] (1934); Wash.Gen.Rules of the Superior Courts, 1 Wash.Rev.Stat.Ann. (Remington, 1932) p. 160, Rule VI (e) and (f).

Note to Subdivision (h). Compare Calif.Code Civ.Proc. (Deering, 1937) § 434; 2 Minn.Stat. (Mason, 1927) § 9252; N.Y.C.P.A. (1937) §§ 278 and 279; Wash.Gen.Rules of the Superior Courts, 1 Wash.Rev.Stat.Ann. (Remington, 1932) p. 160, Rule VI (e). This rule continues U.S.C., Title 28, former § 80 (Dismissal or remand) (of action over which district court lacks jurisdiction), while U.S.C., Title 28, former § 399 (Amendments to show diverse citizenship) is continued by Rule 15.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. Subdivision (a). Various minor alterations in language have been made to improve the statement of the rule. All references to bills of particulars have been stricken in accordance with changes made in subdivision (e).

Subdivision (b). The addition of defense (7), "failure to join an indispensable party," cures an omission in the rules, which are silent as to the mode of raising such failure. See Commentary, Manner of Raising Objection of Non-Joinder of Indispensable Party, 1940, 2 Fed.Rules Serv. 658 and, 1942, 5 Fed.Rules Serv. 820. In one case, *United States* v. *Metropolitan Life Ins. Co.*, E.D.Pa. 1941, 36 F.Supp. 399, the failure to join an indispensable party was raised under Rule 12(c).

Rule 12(b)(6), permitting a motion to dismiss for failure of the complaint to state a claim on which relief can be granted, is substantially the same as the old demurrer for failure of a pleading to state a cause of action. Some courts have held that as the rule by its terms refers to statements in the complaint, extraneous matter on affidavits, depositions or otherwise, may not be introduced in support of the motion, or to resist it. On the other hand, in many cases the district courts have permitted the introduction of such material. When these cases have reached circuit courts of appeals in situations where the extraneous material so received shows that there is no genuine issue as to any material question of fact and that on the undisputed facts as disclosed by the affidavits or depositions, one party or the other is entitled to judgment as a matter of law, the circuit courts, properly enough, have been reluctant to dispose of the case merely on the face of the pleading, and in the interest of prompt disposition of the action have made a final disposition of it. In dealing with such situations the Second Circuit has made the sound suggestion that whatever its label or original basis, the motion may be treated as a motion for summary judgment and disposed of as such. *Samara* v. *United States*, C.C.A.2d, 1942, 129 F.2d 594, cert. den., 1942, 317 U.S. 686, 63 S.Ct. 258; *Boro Hall Corp.* v. *General Motors Corp.*, C.C.A.2d, 1942, 124 F.2d 822, cert. den., 1943, 317 U.S. 695, 63 S.Ct. 436. See also *Kitheart* v. *Metropolitan Life Ins. Co.*, C.C.A.8th, 1945, 150 F.2d 997, aff'g 62 F.Supp. 93.

It has also been suggested that this practice could be justified on the ground that the federal rules permit "speaking" motions. The Committee entertains the view that on motion under Rule 12(b)(6) to dismiss for failure of the complaint to state a good claim, the trial court should have authority to permit the introduction of extraneous matter, such as may be offered on a motion for summary judgment, and if it does not exclude such matter the motion should then be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in Rule 56 relating to summary judgments, and, of course, in such a situation, when the case reaches the circuit court of appeals, that court should treat the motion in the same way. The Committee believes that such practice, however, should be tied to the summary judgment rule. The term "speaking motion" is not mentioned in the rules, and if there is such a thing its limitations are undefined. Where extraneous matter is received, by tying further proceedings to the summary judgment rule the courts have a definite basis in the rules for disposing of the motion.

The Committee emphasizes particularly the fact that the summary judgment rule does not permit a case to be disposed of by judgment on the merits on affidavits, which disclose a conflict on a material issue of fact, and unless this practice is tied to the summary judgment rule, the extent to which a court, on the introduction of such extraneous matter, may resolve questions of fact, on conflicting proof would be left uncertain.

The decisions dealing with this general situation may be generally grouped as follows: (1) cases dealing with the use of affidavits and other extraneous material on motions; (2) cases reversing judgments to prevent final determination on mere pleading allegations alone.

Under group (1) are: *Boro Hall Corp.* v. *General Motors Corp.*, C.C.A.2d, 1942, 124 F.2d 822, cert. den., 1943, 317 U.S. 695, 63 S.Ct. 436; *Gallup* v. *Caldwell*, C.C.A.3d, 1941, 120 F.2d 90; *Central Mexico Light & Power Co.* v. *Munch*, C.C.A.2d, 1940, 116 F.2d 85; *National Labor Relations Board* v. *Montgomery Ward & Co.*, App.D.C. 1944, 79 U.S.App.D.C. 200, 144 F.2d 528, cert. den., 1944, 65 S.Ct. 134; *Urquhart* v. *American-La France Foamite Corp.*, App.D.C. 1944, 79 U.S.App.D.C. 219, 144 P.2d 542; *Samara* v. *United States*, C.C.A.2d, 1942, 129 F.2d 594; *Cohen* v. *American Window Glass Co.*, C.C.A.2d, 1942, 126 F.2d 111; *Sperry Products Inc.* v. *Association of American Railroads*, C.C.A.2d, 1942, 132 F.2d 408; *Joint Council Dining Car Employees Local 370* v. *Delaware, Lackawanna and Western R. Co.*, C.C.A.2d, 1946, 157 F.2d 417; *Weeks* v. *Bareco Oil Co.*, C.C.A.7th, 1941, 125 F.2d 84; *Carroll* v. *Morrison Hotel Corp.*, C.C.A.7th, 1945, 149 F.2d 404; *Victory v. Manning*, C.C.A.3rd, 1942, 128 F.2d 415; *Locals No. 1470, No. 1469, and 1512 of International Longshoremen's Association* v. *Southern Pacific Co.*, C.C.A.5th, 1942, 131 P.2d 605; *Lucking* v. *Delano*, C.C.A.6th, 1942, 129 F.2d 283; *San Francisco Lodge No. 68 of International Association of Machinists* v. *Forrestal*, N.D.Cal. 1944, 58 F.Supp. 466; *Benson* v. *Export Equipment Corp.*, N. Mex. 1945, 164 P.2d 380, construing New Mexico rule identical with Rule 12(b)(6); *F. E. Myers & Bros. Co.* v. *Gould Pumps, Inc.*, W.D.N.Y. 1946, 9 Fed.Rules Serv. 12b, 33 Case 2, 5 F.R.D. 132. Cf. *Kohler* v. *Jacobs*, C.C.A.5th, 1943, 138 F.2d 440; *Cohen* v. *United States*, C.C.A.8th, 1942, 129 F.2d 733.

Under group (2) are: *Sparks* v. *England*, C.C.A.8th, 1940, 113 F.2d 579; *Continental Collieries, Inc.* v. *Shober*, C.C.A.3d, 1942, 130 F.2d 631; *Downey* v. *Palmer*, C.C.A.2d 1940, 114 F.2d 116; *DeLoach* v. *Crowley's Inc.*, C.C.A.5th, 1942, 128 F.2d 378; *Leimer* v. *State Mutual Life Assurance Co. of Worcester, Mass.*, C.C.A.8th, 1940, 108 F.2d 302; *Rossiter* v. *Vogel*, C.C.A.2d, 1943, 134 F.2d 908, compare s. c., C.C.A.2d, 1945, 148 F.2d 292; *Karl Kiefer Machine Co.* v. *United States Bottlers Machinery Co.*, C.C.A.7th, 1940, 113 F.2d 356; *Chicago Metallic Mfg. Co.* v. *Edward Katzinger Co.*, C.C.A.7th, 1941, 123 F.2d 518; *Louisiana Farmers' Protective Union, Inc.* v. *Great Atlantic & Pacific Tea Co. of America, Inc.*, C.C.A.8th, 1942, 131 F.2d 419; *Publicity Bldg. Realty Corp.* v. *Hannegan*, C.C.A.8th, 1943, 139 F.2d 583; *Dioguardi* v. *Durning*, C.C.A.2d, 1944, 139 F.2d 774; *Package Closure Corp.* v. *Sealright Co., Inc.*, C.C.A.2d, 1944, 141 F.2d 972; *Tahir Erk* v. *Glenn L. Martin Co.*, C.C.A.4th, 1941, 116 F.2d 865; *Bell* v. *Preferred Life Assurance Society of Montgomery, Ala.*, 1943, 320 U.S. 238, 64 S.Ct. 5.

The addition at the end of subdivision (b) makes it clear that on a motion under Rule 12(b)(6) extraneous material may not be considered if the court excludes it, but that if the court does not exclude such material the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. It will also be observed that if a motion under Rule 12(b)(6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment. In this manner and to this extent the amendment regularizes the practice above described. As the courts are already dealing with cases in this way, the effect of this amendment is really only to define the practice carefully and apply the requirements of the summary judgment rule in the disposition of the motion.

Subdivision (c). The sentence appended to subdivision (c) performs the same function and is grounded on the same reasons as the corresponding sentence added in subdivision (b).

Subdivision (d). The change here was made necessary because of the addition of defense (7) in subdivision (b).

Subdivision (e). References in this subdivision to a bill of particulars have been deleted, and the motion provided for is confined to one for a more definite statement, to be obtained only in cases where the movant cannot reasonably be required to frame an answer or other responsive pleading to the pleading in question. With respect to preparations for trial, the party is properly relegated to the various methods of examination and discovery provided in the rules for that purpose. *Slusher* v. *Jones,* E.D.Ky. 1943, 7 Fed.Rules Serv. 12e.231, Case 5, 3 F.R.D. 168; *Best Foods, Inc.* v. *General Mills, Inc.,* D.Del. 1943, 7 Fed.Rules Serv. 12e.231, Case 7, 3 F.R.D. 275; *Braden* v. *Callaway,* E.D.Tenn. 1943, 8 Fed.Rules Serv. 12e.231, Case 1 (". . . most courts . . . conclude that the definiteness required is only such as will be sufficient for the party to prepare responsive pleadings"). Accordingly, the reference to the 20 day time limit has also been eliminated, since the purpose of this present provision is to state a time period where the motion for a bill is made for the purpose of preparing for trial.

Rule 12(e) as originally drawn has been the subject of more judicial rulings than any other part of the rules, and has been much criticized by commentators, judges and members of the bar. See general discussion and cases cited in 1 Moore's Federal Practice, 1938, Cum.Supplement, § 12.07, under "Page 657"; also, Holtzoff, New Federal Procedure and the Courts, 1940, 35-41. And compare vote of Second Circuit Conference of Circuit and District Judges, June 1940, recommending the abolition of the bill of particulars; *Sun Valley Mfg. Co.* v. *Mylish,* E.D.Pa. 1944, 8 Fed.Rules Serv. 12e.231, Case 6 ("Our experience . . . has demonstrated not only that 'the office of the bill of particulars is fast becoming obsolete' . . . but that in view of the adequate discovery procedure available under the Rules, motions for bills of particulars should be abolished altogether."); *Walling* v. *American Steamship Co.,* W.D.N.Y. 1945, 4 F.R.D. 355, 8 Fed.Rules Serv. 12e.244, Case 8 (". . . the adoption of the rule was ill advised. It has led to confusion, duplication and delay.") The tendency of some courts freely to grant extended bills of particulars has served to neutralize any helpful benefits derived from Rule 8, and has overlooked the intended use of the rules on depositions and discovery. The words "or to prepare for trial"—eliminated by the proposed amendment—have sometimes been seized upon as grounds for compulsory statement in the opposing pleading of all the details which the movant would have to meet at the trial. On the other hand, many courts have in effect read these words out of the rule. See *Walling* v. *Alabama Pipe Co.,* W.D.Mo. 1942, 3 F.R.D. 159, 6 Fed.Rules Serv. 12e.244, Case 7; *Fleming* v. *Mason & Dixon Lines, Inc.,* E.D.Tenn. 1941, 42 F.Supp. 230; *Kellogg Co.* v. *National Biscuit Co.,* D.N.J. 1941, 38 F.Supp. 643; *Brown* v. *H. L. Green Co.,* S.D.N.Y. 1943, 7 Fed.Rules Serv. 12e.231, Case 6; *Pedersen* v. *Standard Accident Ins. Co.,* W.D.Mo. 1945, 8 Fed.Rules Serv. 12e.231, Case 8; *Bowles* v. *Ohse,* D.Neb. 1945, 4 F.R.D. 403, 9 Fed.Rules Serv. 12e.231, Case 1; *Klages* v. *Cohen,* E.D.N.Y. 1945, 9 Fed.Rules Serv. 8a.25, Case 4; *Bowles* v. *Lawrence,* D.Mass. 1945, 8 Fed.Rules Serv. 12e.231, Case 19; *McKinney Tool & Mfg. Co.* v. *Hoyt,* N.D.Ohio 1945, 9 Fed.Rules Serv. 12e.235, Case 1; *Bowles* v. *Jack,* D.Minn. 1945, 5 F.R.D. 1, 9 Fed.Rules Serv. 12e.244, Case 9. And it has been urged from the bench that the phrase be stricken. *Poole* v . *White,* N.D.W.Va. 1941. 5 Fed.Rules Serv. 12e.231, Case 4, 2 F.R.D. 40. See also *Bowles* v. *Gabel,* W.D.Mo. 1946, 9 Fed.Rules Serv. 12e.244, Case 10 ("The courts have never favored that portion of the rules which undertook to justify a motion of this kind for the purpose of aiding counsel in preparing his case for trial.").

Subdivision (f). This amendment affords a specific method of raising the insufficiency of a defense, a matter which has troubled some courts, although attack has been permitted in one way or another. See *Dysart* v. *Remington-Rand,* Inc., D.Conn. 1939, 31 F.Supp. 296; *Eastman Kodak Co.* v. *McAuley,* S.D.N.Y. 1941, 4 Fed.Rules Serv. 12f.21, Case 8, 2 F.R.D. 21; *Schenley Distillers Corp.* v. *Renken,* E.D.S.C. 1940, 34 F.Supp. 678; *Yale Transport Corp.* v. *Yellow Truck & Coach Mfg. Co.,* S.D.N.Y. 1944, 3 F.R.D. 440; *United States* v. *Turner Milk Co.,* N.D.Ill. 1941, 4 Fed.Rules Serv. 12b.51, Case 3, 1 F.R.D. 643; *Teiger* v. *Stephan Oderwald, Inc.,* S.D.N.Y. 1940, 31 F.Supp. 626; *Teplitsky* v. *Pennsylvania R. Co.,* N.D.Ill. 1941, 38 F.Supp. 535; *Gallagher* v. *Carroll,* E.D.N.Y. 1939, 27 F.Supp. 568; *United States* v. *Palmer,* S.D.N.Y. 1939, 28 F.Supp. 936. And see *Indemnity Ins. Co. of North America* v. *Pan American Airways, Inc.,* S.D.N.Y. 1944, 58 F.Supp. 338; Commentary, Modes of Attacking Insufficient Defenses in the Answer, 1939, 1 Fed.Rules Serv. 669, 1940, 2 Fed.Rules Serv. 640.

Subdivision (g). The change in title couforms with the companion provision in subdivision (h).

The alteration of the "except" clause requires that other than provided in subdivision (h) a party who resorts to a motion to raise defenses specified in the rule, must include in one motion all that are then available to him. Under the original rule defenses which could be raised by motion were divided into two groups which could be the subjects of two successive motions.

Subdivision (h). The addition of the phrase relating to indispensable parties is one of necessity.

Notes of Advisory Committee on 1963 Amendment to Rules

This amendment conforms to the amendment of Rule 4(e). See also the Advisory Committee's Note to amended Rule 4(b).

Notes of Advisory Committee on 1966 Amendment to Rules

Subdivision (b)(7). The terminology of this subdivision is changed to accord with the amendment of Rule 19. See the Advisory Committee's Note to Rule 19, as amended, especially the third paragraph therein before the caption "Subdivision (c)."

Subdivision (g). Subdivision (g) has forbidden a defendant who makes a preanswer motion under this rule from making a further motion presenting any defense or objection which was available to him at the time he made the first motion and which he could have included, but did not in fact include therein. Thus if the defendant moves before answer to dismiss the complaint for failure to state a claim, he is barred from making a further motion presenting the defense of improper venue, if that defense was available to him when he made his original motion. Amended subdivision (g) is to the same effect. This required consolidation of defenses and objections in a Rule 12 motion is salutary in that it works against piecemeal consider-

ation of a case. For exceptions to the requirement of consolidation, see the last clause of subdivision (g), referring to new subdivision (h)(2).

Subdivision (*h*). The question has arisen whether an omitted defense which cannot be made the basis of a second motion may nevertheless be pleaded in the answer. Subdivision (h) called for waiver of "* * * defenses and objections which he [defendant] does not present * * * by motion * * * or, if he has made no motion, in his answer * * *." If the clause "if he has made no motion," was read literally, it seemed that the omitted defense was waived and could not be pleaded in the answer. On the other hand, the clause might be read as adding nothing of substance to the preceding words; in that event it appeared that a defense was not waived by reason of being omitted from the motion and might be set up in the answer. The decisions were divided. Favoring waiver, see *Keefe* v. *Derounian*, 6 F.R.D. 11 (N.D.Ill. 1946); *Elbinger* v. *Precision Metal Workers Corp.*, 18 F.R.D. 467 (E.D.Wis. 1956); see also *Rensing* v. *Turner Aviation Corp.*, 166 F.Supp. 790 (N.D.Ill. 1958); *P. Beiersdorf & Co.* v. *Duke Laboratories, Inc.*, 10 F.R.D. 282 (S.D.N.Y. 1950); *Neset* v. *Christensen*, 92 F.Supp. 78 (E.D.N.Y. 1950). Opposing waiver, see *Phillips* v. *Baker*, 121 F.2d 752 (9th Cir. 1941); *Crum* v. *Graham*, 32 F.R.D. 173 (D.Mont. 1963) (regretfully following the Phillips case); see also *Birnbaum* v. *Birrell*, 9 F.R.D. 72 (S.D.N.Y. 1948); *Johnson* v. *Joseph Schlitz Brewing Co.*, 33 F.Supp. 176 (E.D.Tenn. 1940); cf. *Carter* v. *American Bus Lines, Inc.*, 22 F.R.D. 323 (D.Neb. 1958).

Amended subdivision (h)(1)(A) eliminates the ambiguity and states that certain specified defenses which were available to a party when he made a preanswer motion, but which he omitted from the motion, are waived. The specified defenses are lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process (see Rule 12(b)(2)-(5)). A party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of subdivision (g) forbidding successive motions.

By amended subdivision (h)(1)(B), the specified defenses, even if not waived by the operation of (A), are waived by the failure to raise them by a motion under Rule 12 or in the responsive pleading or any amendment thereof to which the party is entitled as a matter of course. The specified defenses are of such a character that they should not be delayed and brought up for the first time by means of an application to the court to amend the responsive pleading.

Since the language of the subdivisions is made clear, the party is put on fair notice of the effect of his actions and omissions and can guard himself against unintended waiver. It is to be noted that while the defenses specified in subdivision (h)(1) are subject to waiver as there provided, the more substantial defenses of failure to state a claim upon which relief can be granted, failure to join a party indispensable under Rule 19, and failure to state a legal defense to a claim (see Rule 12(b)(6), (7), (f)), as well as the defense of lack of jurisdiction over the subject matter (see Rule 12(b)(1)), are expressly preserved against waiver by amended subdivision (h)(2) and (3).

CROSS REFERENCES

Demurrers abolished, see rule 7.
Dismissal of actions—
Claims of opposing party, judgment on counterclaim or cross-claim, see rule 13.
Class actions, see rule 23(c).
Costs of previously-dismissed action, see rule 41.
Depositions, right to use depositions in former action, see rule 26.
Failure to serve answers to interrogatories, see rule 37.
Findings of fact and conclusions of law, necessity, see rule 52.
Voluntary and involuntary dismissal, see rule 41.
District courts—
Jurisdiction, see chapter 85 of this title.
Trials, hearings, and orders in chambers, see rule 77.
Venue, see chapter 87 of this title.
Evidence on motions, see rule 43.
Findings of fact and conclusions of law unnecessary, see rule 52.
Indication of simplicity and brevity of statement, see rule 84.
Judgment, definition of, see rule 54.
Motions—
Adoption of statement by reference, see rule 10.
Courts always open for making, see section 452 of this title.
Evidence on, see rule 43.
Extension of time, see rule 6.
Form of, see rule 7.
Motion day and oral hearings, see rule 78.
Technical forms not required, see rule 8.
Time for motions generally, see rule 6.
Parties—
Necessary joinder, see rule 19.
Third-party defendant, defenses to third-party plaintiff and plaintiff's claims, see rule 14.
Pleadings—
Affirmative defenses, see rule 8.
Form of, see rule 10.
Pleadings allowed, see rule 7.
Striking for failure to serve answer to interrogatory, see rule 37.
Waiver, objections to venue, see section 1406 of this title.

FEDERAL RULES OF CRIMINAL PROCEDURE

Bill of particulars, see rule 7, Title 18, Appendix, Crimes and Criminal Procedure.
Demurrers as abolished, see rule 12.
Motion raising defenses and objections, see rule 12 and note of Advisory Committee under the rule.

FORMS

Answer presenting defenses under subd. (b) of this rule, see form 20, Appendix of Forms.
Motion to dismiss, presenting defenses of failure to state a claim, of lack of service of process, of improper venue, and of lack of jurisdiction under subd. (b) of this rule, see form 19.

Rule 13. Counterclaim and Cross Claim

(a) Compulsory counterclaims

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) Permissive counterclaims

A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim exceeding opposing claim

A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount

or different in kind from that sought in the pleading of the opposing party.

(d) Counterclaim against the United States

These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

(e) Counterclaim maturing or acquired after pleading

A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) Omitted counterclaim

When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) Cross-claim against co-party

A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) Joinder of additional parties

Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

(i) Separate trials; separate judgments

If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

1. This is substantially former Equity Rule 30 (Answer—Contents—Counterclaim), broadened to include legal as well as equitable counterclaims.

2. Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r.r. 2 and 3, and O. 21, r.r. 10—17; *Beddall* v. *Maitland*, L.R. 17 Ch.Div. 174, 181, 182 (1881).

3. Certain States have also adopted almost unrestricted provisions concerning both the subject matter of and the parties to a counterclaim. This seems to be the modern tendency. Ark.Civ.Code (Crawford, 1934) §§ 117 (as amended) and 118; N.J.Comp.Stat. (2 Cum.Supp. 1911-1924), N.Y.C.P.A. (1937) §§ 262, 266, 267 (all as amended, Laws of 1936, ch. 324), 268, 269, and 271; Wis.Stat. (1935) § 263.14 (1)(c).

4. Most codes do not expressly provide for a counterclaim in the reply. Clark, Code Pleading (1928), p. 486. Ky.Codes (Carroll, 1932) Civ.Pract. § 98 does provide, however, for such counterclaim.

5. The provisions of this rule respecting counterclaims are subject to Rule 82 (Jurisdiction and Venue Unaffected). For a discussion of Federal jurisdiction and venue in regard to counterclaims and cross-claims, see Shulman and Jaegerman, Some Jurisdictional Limitations in Federal Procedure (1936), 45 Yale L.J. 393, 410 et seq.

6. This rule does not affect such statutes of the United States as U.S.C., Title 28, former § 41(1) (now §§ 1332, 1345, 1359) (United States as plaintiff; civil suits at common law and in equity), relating to assigned claims in actions based on diversity of citizenship.

7. If the action proceeds to judgment without the interposition of a counterclaim as required by subdivision (a) of this rule, the counterclaim is barred. See *American Mills Co.* v. *American Surety Co.*, 260 U.S. 360, 43 S.Ct. 149, 67 L.Ed. 306 (1922); *Marconi Wireless Telegraph Co.* v. *National Electric Signalling Co.*, 206 Fed. 295 (E.D.N.Y., 1913); Hopkins, Federal Equity Rules (8th ed., 1933), p. 213; Simkins, Federal Practice (1934), p. 663

8. For allowance of credits against the United States see U.S.C., Title 26, § 3772(a)(1)(2)(b) (Suits for refunds of internal revenue taxes—limitations); U.S.C., Title 28, former § 774 (now § 2406) (Suits by United States against individuals; credits), former § 775 (Suits under postal laws; credits); U.S.C., Title 31, § 227 (Offsets against judgments and claims against United States).

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENTS TO RULES

Note. Subdivision (a). The use of the word "filing" was inadvertent. The word "serving" conforms with subdivision (e) and with usage generally througout the rules.

The removal of the phrase "not the subject of a pending action" and the addition of the new clause at the end of the subdivision is designed to eliminate the ambiguity noted in *Prudential Insurance Co. of America* v. *Saxe*, App.D.C. 1943, 77 U.S.App.D.C. 144, 134 F.2d 16, 33-34, cert. den., 1943, 319 U.S. 745, 63 S.Ct. 1033. The rewording of the subdivision in this respect insures against an undesirable possibility presented under the original rule whereby a party having a claim which would be the subject of a compulsory counterclaim could avoid stating it as such by bringing an independent action in another court after the commencement of the federal action but before serving his pleading in the federal action.

Subdivision (g). The amendment is to care for a situation such as where a second mortgagee is made defendant in a foreclosure proceeding and wishes to file a cross-complaint against the mortgagor in order to secure a personal judgment for the indebtedness and foreclose his lien. A claim of this sort by the second mortgagee may not necessarily arise out of the transaction or occurrence that is the subject matter of the original action under the terms of Rule 13(g).

Subdivision (h). The change clarifies the interdependence of Rules 13(i) and 54(b).

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENTS TO RULES

When a defendant, if he desires to defend his interest in property, is obliged to come in and litigate in a court to whose jurisdiction he could not ordinarily be subjected, fairness suggests that he should not be required to assert counterclaims, but should rather be permitted to do so at his election. If, however, he does elect to assert a counterclaim, it seems fair to require him to assert any other which is compulsory within the meaning of Rule 13(a). Clause (2), added by amendment to Rule 13(a), carries out this idea. It will apply to various cases described in Rule 4(e), as amended, where service is effected through attachment or other process by which the court does not acquire jurisdiction to render a personal judgment against the defendant. Clause (2) will also apply to actions commenced in State courts jurisdictionally grounded on attachment or the like, and removed to the Federal courts.

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENTS TO RULES

Rule 13(h), dealing with the joinder of additional parties to a counterclaim or cross-claim, has partaken of some of the textual difficulties of Rule 19 on necessary joinder of parties. See Advisory Committee's Note to Rule 19, as amended; cf. 3 Moore's Federal Practice, Par. 13.39 (2d ed. 1963), and Supp. thereto; 1A Barron & Holtzoff, Federal Practice and Procedure § 399 (Wright ed. 1960). Rule 13(h) has also been inadequate in failing to call attention to the fact that a party pleading a counterclaim or cross-claim may join additional persons when the conditions for permissive joinder of parties under Rule 20 are satisfied.

The amendment of Rule 13(h) supplies the latter omission by expressly referring to Rule 20, as amended, and also incorporates by direct reference the revised criteria and procedures of Rule 19, as amended. Hereafter, for the purpose of determining who must or may be joined as additional parties to a counterclaim or cross-claim, the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be, and amended Rules 19 and 20 are to be applied in the usual fashion. See also Rules 13(a) (compulsory counterclaims) and 22 (interpleader).

The amendment of Rule 13(h), like the amendment of Rule 19, does not attempt to regulate Federal jurisdiction or venue. See Rule 82. It should be noted, however, that in some situations the decisional law has recognized "ancillary" Federal jurisdiction over counterclaims and cross-claims and "ancillary" venue as to parties to these claims.

CROSS REFERENCES

Counterclaim—
- Default judgment against counter-claimants, see rule 55.
- Dismissal, see rule 41.
- Mistake in designation of defense, see rule 8.
- Reply, see rule 7.
- Requisites of pleading, see rule 8.
- Service of pleadings, numerous defendants, see rule 5.
- Summary judgment, see rule 56.
- Third party practice, see rule 14.
- Time for reply by United States, see rule 12.
- Time of service of reply, see rule 12.
- Voluntary dismissal, see rule 41.

Cross-claim—
- Answer to, if answer contains a cross-claim, see rule 7.
- Default judgment against, see rule 55.
- Dismissal, see rule 41.
- Joinder, see rule 18.
- Requisites of pleading, see rule 8.
- Service of pleadings, numerous defendants, see rule 5.
- Summary judgment, see rule 56.
- Third party practice, see rule 14.
- Time for answer by United States, see rule 12.

FORMS

Counterclaim, see forms 20 and 21, Appendix of Forms.

Cross-claim, see form 20.

Rule 14. Third Party Practice

(a) When defendant may bring in third party

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counter-claims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

(b) When plaintiff may bring in third party

When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) Admiralty and maritime claims

When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make his defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Third-party impleader is in some aspects a modern innovation in law and equity although well known in

admiralty. Because of its many advantages a liberal procedure with respect to it has developed in England, in the Federal admiralty courts, and in some American State jurisdictions. See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16A, r.r. 1-13; United States Supreme Court Admiralty Rules (1920), Rule 56 (Right to Bring in Party Jointly Liable); Pa.Stat.Ann. (Purdon, 1936) Title 12, § 141; Wis.Stat. (1935) §§ 260.19, 260.20; N.Y.C.P.A. (1937) §§ 193 (2), 211(a). Compare La.Code Pract. (Dart, 1932) §§ 378—388. For the practice in Texas as developed by judicial decision, see *Lottman* v. *Cuilla*, 288 S.W. 123, 126 (Tex., 1926). For a treatment of this subject see Gregory, Legislative Loss Distribution in Negligence Actions (1936); Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure (1936), 45 Yale L.J. 393, 417, et seq.

Third-party impleader under the former conformity act has been applied in actions at law in the Federal courts. *Lowry and Co., Inc.*, v. *National City Bank of New York*, 28 F.2d 895 (S.D.N.Y., 1928); *Yellow Cab Co. of Philadelphia* v. *Rodgers*, 61 F.2d 729 (C.C.A.3d, 1932).

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. The provisions in Rule 14(a) which relate to the impleading of a third party who is or may be liable to the plaintiff have been deleted by the proposed amendment. It has been held that under Rule 14(a) the plaintiff need not amend his complaint to state a claim against such third party if he does not wish to do so. *Satink* v. *Holland Township*, D.N.J. 1940, 31 F.Supp. 229, noted, 1940, 88 U.Pa.L.Rev. 751; *Connelly* v. *Bender*, E.D.Mich. 1941, 46 F.Supp. 368; *Whitmire* v. *Partin (Milton)*, E.D.Tenn. 1941, 2 F.R.D. 83, 5 Fed.Rules Serv. 14a.513, Case 2; *Crim* v. *Lumbermen's Mutual Casualty Co.*, D.D.C. 1939, 26 F.Supp. 715; *Carbola Chemical Co., Inc.* v. *Trundle*, S.D.N.Y. 1943, 3 F.R.D. 502, 7 Fed.Rules Serv. 14a.224, Case 1; *Roadway Express, Inc.* v. *Automobile Ins. Co. of Hartford, Conn.* (Providence Washington Ins. Co.), N.D.Ohio 1945, 8 Fed.Rules Serv. 14a.513, Case 3. In *Delano* v. *Ives*, E.D.Pa. 1941, 40 F.Supp. 672, the court said: ". . . the weight of authority is to the effect that a defendant cannot compel the plaintiff, who has sued him, to sue also a third party whom he does not wish to sue, by tendering in a third party complaint the third party as an additional defendant directly liable to the plaintiff." Thus impleader here amounts to no more than a mere offer of a party to the plaintiff, and if he rejects it, the attempt is a time-consuming futility. See *Satink* v. *Holland Township, supra; Malkin* v. *Arundel Corp.*, D.Md. 1941, 36 F.Supp. 948; also Koenigsberger, Suggestions for Changes in the Federal Rules of Civil Procedure, 1941, 4 Fed.Rules Serv. 1010. But cf. *Atlantic Coast Line R. Co.* v. *United States Fidelity & Guaranty Co.*, M.D.Ga. 1943, 52 F.Supp. 177. Moreover, in any case where the plaintiff could not have joined the third party originally because of jurisdictional limitations such as lack of diversity of citizenship, the majority view is that any attempt by the plaintiff to amend his complaint and assert a claim against the impleaded third party would be unavailing. *Hoskie* v. *Prudential Ins. Co. of America (Lorrac Real Estate Corp.)*, E.D.N.Y. 1941, 39 F.Supp. 305; *Johnson* v. *G. J. Sherrard Co. (New England Telephone & Telegraph Co.)*, D.Mass. 1941, 5 Fed.Rules Serv. 14a.511, Case 1, 2 F.R.D. 164; *Thompson* v. *Cranston*, W.D.N.Y. 1942, 6 Fed.Rules Serv. 14a.511, Case 1, 2 F.R.D. 270, aff'd C.C.A.2d, 1942, 132 F.2d 631, cert. den., 1943, 319 U.S. 741, 63 S.Ct. 1028; *Friend* v. *Middle Atlantic Transportation Co.*, C.C.A.2d, 1946, 153 F.2d 778, cert. den., 1946, 66 S.Ct. 1370; *Herrington* v. *Jones*, E.D.La. 1941, 5 Fed.Rules Serv. 14a.511, Case 2, 2 F.R.D. 108; *Banks* v. *Employers' Liability Assurance Corp. (Central Surety & Ins. Corp.)*, W.D.Mo. 1943, 7 Fed.Rules Serv. 14a.11, Case 2; *Saunders* v. *Baltimore & Ohio R. Co.*, S.D.W.Va. 1945, 9 Fed.Rules Serv. 14a.62, Case 2; *Hull* v. *United States Rubber Co. (Johnson Larsen & Co.)*, E.D.Mich. 1945, 9 Fed.Rules Serv. 14a.62, Case 3. See also concurring opinion of Circuit Judge Minton in *People of State of Illinois for use of Trust Co. of Chicago* v. *Maryland Casualty Co.*, C.C.A.7th, 1942, 132 F.2d 850, 853. Contra: *Sklar* v. *Hayes (Singer)*, E.D.Pa. 1941, 4 Fed.Rules Serv. 14a.511, Case 2, 1 F.R.D. 594. Discussion of the problem will be found in Commentary, Amendment of Plaintiff's Pleading to Assert Claim Against Third-Party Defendant, 1942, 5 Fed.Rules Serv. 811; Commentary, Federal Jurisdiction in Third-Party Practice, 1943, 6 Fed.Rules Serv. 766; Holtzoff, Some Problems Under Federal Third-Party Practice, 1941, 3 La.L.Rev. 408, 419-420; 1. Moore's Federal Practice, 1938, Cum.Supplement § 14.08. For these reasons therefore, the words "or to the plaintiff" in the first sentence of subdivision (a) have been removed by the amendment; and in conformance therewith the words "the plaintiff" in the second sentence of the subdivision, and the words "or to the third-party plaintiff" in the concluding sentence thereof have likewise been eliminated.

The third sentence of Rule 14(a) has been expanded to clarify the right of the third-party defendant to assert any defenses which the third-party plaintiff may have to the plaintiff's claim. This protects the impleaded third-party defendant where the third-party plaintiff fails or neglects to assert a proper defense to the plaintiff's action. A new sentence has also been inserted giving the third-party defendant the right to assert directly against the original plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. This permits all claims arising out of the same transaction or occurrence to be heard and determined in the same action. See *Atlantic Coast Line R. Co.* v. *United States Fidelity & Guaranty Co.*, M.D.Ga. 1943, 52 F.Supp. 177. Accordingly, the next to the last sentence of subdivision (a) has also been revised to make clear that the plaintiff may, if he desires, assert directly against the third-party defendant either by amendment or by a new pleading any claim he may have against him arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. In such a case, the third-party defendant then is entitled to assert the defenses, counter-claims and cross-claims provided in Rules 12 and 13.

The sentence reading "The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff, or to the third-party plaintiff" has been stricken from Rule 14(a), not to change the law, but because the sentence states a rule of substantive law which is not within the scope of a procedural rule. It is not the purpose of the rules to state the effect of a judgment.

The elimination of the words "the third-party plaintiff, or any other party" from the second sentence of Rule 14(a), together with the insertion of the new phrases therein, are not changes of substance but are merely for the purpose of clarification.

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

Under the amendment of the initial sentences of the subdivision, a defendant as a third-party plaintiff may freely and without leave of court bring in a third-party defendant if he files the third-party complaint not later than 10 days after he serves his original answer. When the impleader comes so early in the case, there is little value in requiring a preliminary ruling by the court on the propriety of the impleader.

After the third-party defendant is brought in, the court has discretion to strike the third-party claim if it is obviously unmeritorious and can ouly delay or prejudice the disposition of the plaintiff's claim, or to sever the third-party claim or accord it separate trial if confusion or prejudice would otherwise result. This discretion, applicable not merely to the cases covered by the amendment where the third-party defendant is brought in without leave, but to all impleaders under

the rule, is emphasized in the next-to-last sentence of the subdivision, added by amendment.

In dispensing with leave of court for an impleader filed not later than 10 days after serving the answer, but retaining the leave requirement for impleaders sought to be effected thereafter, the amended subdivision takes a moderate position on the lines urged by some commentators, see Note, 43 Minn.L.Rev. 115 (1958); cf. Pa.R.Civ.P. 2252-53 (60 days after service on the defendant); Minn.R.Civ.P. 14.01 (45 days). Other commentators would dispense with the requirement of leave regardless of the time when impleader is effected, and would rely on subsequent action by the court to dismiss the impleader if it would unduly delay or complicate the litigation or would be otherwise objectionable. See 1A Barron & Holtzoff, Federal Practice & Procedure 649-50 (Wright ed. 1960); Comment, 58 Colum.L.Rev. 532, 546 (1958); cf. N.Y.Civ.Prac. Act § 193-a; Me.R.Civ.P. 14. The amended subdivision preserves the value of a preliminary screening, through the leave procedure, of impleaders attempted after the 10-day period.

The amendment applies also when an impleader is initiated by a third-party defendant against a person who may be liable to him, as provided in the last sentence of the subdivision.

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

Rule 14 was modeled on Admiralty Rule 56. An important feature of Admiralty Rule 56 was that it allowed impleader not only of a person who might be liable to the defendant by way of remedy over, but also of any person who might be liable to the plaintiff. The importance of this provision was that the defendant was entitled to insist that the plaintiff proceed to judgment against the third-party defendant. In certain cases this was a valuable implementation of a substantive right. For example, in a case of ship collision where a findmg of mutual fault is possible, one shipowner, if sued alone, faces the prospect of an absolute judgment for the full amount of the damage suffered by an innocent third party; but if he can implead the owner of the other vessel, and if mutual fault is found, the judgment against the original defendant will be in the first instance only for a moiety of the damages; liability for the remainder will be conditioned on the plaintiff's inability to coliect from the third-party defendant.

This feature was originally incorporated in Rule 14, but was eliminated by the amendment of 1946, so that under the amended rule a third party could not be impleaded on the basis that he might be liable to the plaintiff. One of the reasons for the amendment was that the Civil Rule, unlike the Admiralty Rule, did not require the plaintiff to go to judgment against the third-party defendant. Another reason was that where jurisdiction depended on diversity of citizenship the impleader of an adversary having the same citizenship as the plaintiff was not considered possible.

Retention of the admiralty practice in those cases that will be counterparts of a suit in admiralty is clearly desirable.

CROSS REFERENCES

Third party answer, service of third party complaint, see rule 7.

Third party claim—
- Dismissal of, see rule 41.
- Joinder, see rule 18.
- Judgment on less than all claims, see rule 54.
- Requisites, see rule 8.
- Separate trial, see rule 42.

Third party complaint, leave to summon person not an original party, see rule 7.

Third party plaintiff, default judgment against, see rule 55.

Third party tort liability to United States for hospital and medical care, see section 2651 et. seq. of Title 42, The Public Health and Welfare.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to conform to the evidence

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation back of amendments

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental pleadings

Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental plead-

ing setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

(As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

See generally for the present federal practice, former Equity Rules 19 (Amendments Generally), 28 (Amendment of Bill as of Course), 32 (Answer to Amended Bill), 34 (Supplemental Pleading), and 35 (Bills of Revivor and Supplemental Bills—Form); U.S.C., Title 28, former § 399 (now § 1653) (Amendments to show diverse citizenship) and former § 777 (Defects of Form; amendments). See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 28, r.r. 1—13; O. 20, r. 4; O. 24, r.r. 1—3.

Note to Subdivision (a). The right to serve an amended pleading once as of course is common. 4 Mont.Rev.Codes Ann. (1935) § 9186; 1 Ore.Code Ann. (1930) § 1-904; 1 S.C.Code (Michie, 1932) § 493; English Rules Under the Judicature Act (The Annual Practice, 1937) O. 28, r. 2. Provision for amendment of pleading before trial, by leave of court, is in almost every code. If there is no statute the power of the court to grant leave is said to be inherent. Clark, Code Pleading, (1928) pp. 498, 509.

Note to Subdivision (b). Compare former Equity Rule 19 (Amendments Generally) and code provisions which allow an amendment "at any time in furtherance of justice," (e. g., Ark.Civ.Code (Crawford, 1934) § 155) and which allow an amendment of pleadings to conform to the evidence, where the adverse party has not been misled and prejudiced (e.g., N.M.Stat.Ann. (Courtright, 1929) §§ 105-601, 105-602).

Note to Subdivision (c). "Relation back" is a well recognized doctrine of recent and now more frequent application. Compare Ala.Code Ann. (Michie, 1928) § 9513; Ill.Rev.Stat. (1937) ch. 110, § 170(2); 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308-3(4). See U.S.C., Title 28, former § 399 (now § 1653) (Amendments to show diverse citizenship) for a provision for "relation back."

Note to Subdivision (d). This is an adaptation of Equity Rule 34 (Supplemental Pleading).

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

Rule 15(d) is intended to give the court broad discretion in allowing a supplemental pleading. However, some cases, opposed by other cases and criticized by the commentators, have taken the rigid and formalistic view that where the original complaint fails to state a claim upon which relief can be granted, leave to serve a supplemental complaint must be denied. See *Bonner* v. *Elizabeth Arden, Inc.*, 177 F.2d 703 (2d Cir. 1949); *Bowles* v. *Senderowitz*, 65 F.Supp. 548 (E.D.Pa.), rev'd on other grounds, 158 F.2d 435 (3d Cir. 1946), cert. denied, *Senderowitz* v. *Fleming*, 330 U.S. 848, 67 S.Ct. 1091, 91 L.Ed. 1292 (1947); cf. *LaSalle Nat. Bank* v. *222 East Chestnut St. Corp.*, 267 F.2d 247 (7th Cir.), cert. denied, 361 U.S. 836, 80 S.Ct. 88, 4 L.Ed.2d 77 (1959). But see *Camilla Cotton Oil Co.* v. *Spencer Kellogg & Sons*, 257 F.2d 162 (5th Cir. 1958); *Genuth* v. *National Biscuit Co.*, 81 F.Supp. 213 (S.D.N.Y. 1948), app. dism., 177 F.2d 962 (2d Cir. 1949); 3 Moore's Federal Practice ¶ 15.01 [5] (Supp. 1960); 1A Barron & Holtzoff, Federal Practice & Procedure 820-21 (Wright ed. 1960). Thus plaintiffs have sometimes been needlessly remitted to the difficulties of commencing a new action even though events occurring after the commencement of the original action have made clear the right to relief.

Under the amendment the court has discretion to permit a supplemental pleading despite the fact that the original pleading is defective. As in other situations where a supplemental pleading is offered, the court is to determine in the light of the particular circumstances whether filing should be permitted, and if so, upon what terms. The amendment does not attempt to deal with such questions as the relation of the statute of limitations to supplemental pleadings, the operation of the doctrine of laches, or the availability of other defenses. All these questions are for decision in accordance with the principles applicable to supplemental pleadings generally. Cf. *Blau* v. *Lamb*, 191 F.Supp. 906 (S.D.N.Y. 1961); *Lendonsol Amusement Corp.* v. *B. & Q. Assoc., Inc.*, 23 F.R.Serv. 15d. 3, Case 1 (D.Mass. 1957).

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

Rule 15(c) is amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or misdescription of a defendant) shall "relate back" to the date of the original pleading.

The problem has arisen most acutely in certain actions by private parties against officers or agencies of the United States. Thus an individual denied social security benefits by the Secretary of Health, Education, and Welfare may secure review of the decision by bringing a civil action against that officer within sixty days. 42 U.S.C. § 405(g) (Supp. III, 1962). In several recent cases the claimants instituted timely action but mistakenly named as defendant the United States, the Department of HEW, the "Federal Security Administration" (a nonexistent agency), and a Secretary who had retired from the office nineteen days before. Discovering their mistakes, the claimants moved to amend their complaints to name the proper defendant; by this time the statutory sixty-day period had expired. The motions were denied on the ground that the amendment "would amount to the commencement of a new proceeding and would not relate back in time so as to avoid the statutory provision * * * that suit be brought within sixty days * * *" *Cohn* v. *Federal Security Adm.*, 199 F.Supp. 884, 885 (W.D.N.Y. 1961); see also *Cunningham* v. *United States*, 199 F.Supp. 541 (W.D.Mo. 1958); *Hall* v. *Department of HEW*, 199 F.Supp. 833 (S.D.Tex. 1960); *Sandridge* v. *Folsom, Secretary of HEW*, 200 F.Supp. 25 (M.D.Tenn. 1959). [The Secretary of Health, Education, and Welfare has approved certain ameliorative regulations under 42 U.S.C. § 405(g). See 29 Fed.Reg. 8209 (June 30, 1964); Jacoby, The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review, 53 Geo.L.J. 19, 42-43 (1964); see also *Simmons* v. *United States Dept. HEW*, 328 F.2d 86 (3d Cir. 1964).]

Analysis in terms of "new proceeding" is traceable to *Davis* v. *L. L. Cohen & Co.*, 268 U.S. 638 (1925), and *Mellon* v. *Arkansas Land & Lumber Co.*, 275 U.S. 460 (1928), but those cases antedate the adoption of the Rules which import different criteria for determining when an amendment is to "relate back". As lower courts have continued to rely on the Davis and Melion cases despite the contrary intent of the Rules, clarification of Rule 15(c) is considered advisable.

Relation back is intimately connected with the policy of the statute of limitations. The policy of the statute limiting the time for suit against the Secretary of HEW would not have been offended by allowing relation back in the situations described above. For the government was put on notice of the claim within the stated period—in the particular instances, by means of the initial delivery of process to a responsible government official (see Rule 4(d)(4) and (5). In these circumstances, characterization of the amendment as a new proceeding is not responsive to the realty, but is merely question-begging; and to deny relation back is to defeat unjustly the claimant's opportunity to prove his case. See the full discussion by Byse, Suing the "Wrong" Defendant in Judicial Review of Federal Ad-

ministrative Action: Proposals for Reform, 77 Harv.L.Rev. 40 (1963); see also Ill.Civ.P.Act § 46(4).

Much the same question arises in other types of actions against the government (see *Byse*, supra, at 45 n. 15). In actions between private parties, the problem of relation back of amendments changing defendants has generally been better handled by the courts, but incorrect criteria have sometimes been applied, leading sporadically to doubtful results. See 1A Barron & Holtzoff, Federal Practice & Procedure § 451 (Wright ed. 1960); 1 id. § 186 (1960); 2 id. § 543 (1961); 3 Moore's Federal Practice, par. 15.15 (Cum.Supp. 1962); Annot., Change in Party After Statute of Limitations Has Run, 8 A.L.R.2d 6 (1949). Rule 15(c) has been amplified to provide a general solution. An amendment changing the party against whom a claim is asserted relates back if the amendment satisfies the usual condition of Rule 15(c) of "arising out of the conduct * * * set forth * * * in the original pleading," and if, within the applicable limitations period, the party brought in by amendment, first, received such notice of the institution of the action—the notice need not be formal—that he would not be prejudiced in defending the action, and, second, knew or should have known that the action would have been brought against him initially had there not been a mistake concerning the identity of the proper party. Revised Rule 15(c) goes on to provide specifically in the government cases that the first and second requirements are satisfied when the government has been notified in the manner there described (see Rule 4(d)(4) and (5). As applied to the government cases, revised Rule 15(c) further advances the objectives of the 1961 amendment of Rule 25(d) (substitution of public officers).

The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs. Also relevant is the amendment of Rule 17(a) (real party in interest). To avoid forfeitures of just claims, revised Rule 17(a) would provide that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed for correction of the defect in the manner there stated.

CROSS REFERENCES

Jurisdiction, amendment to show, see section 1653 of this title.

Recasting of pleadings on removal of cause, see section 1447 of this title.

Substitution of successor to public officer by supplemental pleading, see rule 25.

Time for service of pleadings, see rule 12.

Rule 16. Pre-Trial Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

NOTES OF ADVISORY COMMITTEE ON RULES

1. Similar rules of pre-trial procedure are now in force in Boston, Cleveland, Detroit, and Los Angeles, and a rule substantially like this one has been proposed for the urban centers of New York state. For a discussion of the successful operation of pre-trial procedure in relieving the congested condition of trial calendars of the courts in such cities and for the proposed New York plan, see A Proposal for Minimizing Calendar Delay in Jury Cases (Dec. 1936—published by The New York Law Society); Pre-Trial Procedure and Administration, Third Annual Report of the Judicial Council of the State of New York (1937), pp. 207-243; Report of the Commission on the Administration of Justice in New York State (1934), pp. (288)-(290). See also Pre-Trial Procedure in the Wayne Circuit Court, Detroit, Michigan, Sixth Annual Report of the Judicial Council of Michigan (1936), pp. 63-75; and Sunderland, The Theory and Practice of Pre-Trial Procedure (Dec. 1937) 36 Mich.L.Rev. 215-226, 21 J.Am.Jud.Soc. 125. Compare the English procedure known as the "summons for directions," English Rules Under the Judicature Act (The Annual Practice, 1937) O. 38a; and a similar procedure in New Jersey, N.J.Comp.Stat. (2 Cum.Supp. 1911-1924); N.J. Supreme Court Rules, 2 N.J.Misc.Rep. (1924) 1230, Rules 94, 92, 93, 95 (the last three as amended 1933, 11 N.J.Misc.Rep. (1933) 955).

2. Compare the similar procedure under Rule 56(d) (Summary Judgment—Case Not Fully Adjudicated on Motion). Rule 12(g) (Consolidation of Motions), by requiring to some extent the consolidation of motions dealing with matters preliminary to trial, is a step in the same direction. In connection with clause (5) of this rule, see Rules 53(b) (Masters; Reference) and 53(e)(3) (Master's Report; In Jury Actions).

TITLE IV—PARTIES

Rule 17. Parties Plaintiff and Defendant; Capacity

(a) Real party in interest

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to sue or be sued

The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., §§ 754 and 959(a).

(c) Infants or incompetent persons

Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). The real party in interest provision, except for the last clause which is new, is taken verbatim from former Equity Rule 37 (Parties Generally —Intervention), except that the word "expressly" has been omitted. For similar provisions see N.Y.C.P.A. (1937) § 210; Wyo.Rev.Stat.Ann. (1931) §§ 89-501, 89-502, 89-503; English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 8. See also Equity Rule 41 (Suit to Execute Trusts of Will—Heir as Party). For examples of statutes of the United States providing particularly for an action for the use or benefit of another in the name of the United States, see U.S.C., Title 40, § 270b (Suit by persons furnishing labor and material for work on public building contracts * * * may sue on a payment bond, "in the name of the United States for the use of the person suing"); and U.S.C., Title 25, § 201 (Penalties under laws relating to Indians—how recovered). Compare U.S.C., Title 26, § 3745(c) (Suits for penalties, fines, and forfeitures, under this title, where not otherwise provided for, to be in name of United States).

Note to Subdivision (b). Por capacity see generally Clark and Moore, New Federal Civil Procedure—II. Pleadings and Parties, 44 Yale L.J. 1291, 1312-1317 (1935) and specifically *Coppedge* v. *Clinton,* 72 F.2d 531 (C.C.A.10th, 1934) (natural person); *David Lupton's Sons Co.* v. *Automobile Club of America,* 225 U.S. 489, 32 S.Ct. 711, 56 L.Ed. 1177, Ann.Cas. 1914A, 699 (1912) (corporation); *Puerto Rico* v. *Russell & Co.,* 288 U.S. 476, 53 S.Ct. 447, 77 L.Ed. 903 (1933) (unincorporated assn.); *United Mine Workers of America* v. *Coronado Coal Co.,* 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975, 27 A.L.R. 762 (1922) (federal substantive right enforced against unincorporated association by suit against the association in its common name without naming all its members as parties). This rule follows the existing law as to such associations, as declared in the case last cited above. Compare *Moffat Tunnel League* v. *United States,* 289 U.S. 113, 53 S.Ct. 543, 77 L.Ed. 1069 (1933). See note to Rule 23, clause (1).

Note to Subdivision (c). The provision for infants and incompetent persons is substantially former Equity Rule 70 (Suits by or Against Incompetents) with slight additions. Compare the more detailed English provisions, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r.r. 16-21.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. The new matter [in subdivision (b)] makes clear the controlling character of Ruie 66 regarding suits by or against a federal receiver in a federal court.

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

The minor change in the text of the rule is designed to make it clear that the specific instances enumerated are not exceptions to, but illustrations of, the rule. These illustrations, of course, carry no negative implication to the effect that there are not other instances of recognition as the real party in interest of one whose standing as such may be in doubt. The enumeration is simply of cases in which there might be substantial doubt as to the issue but for the specific enumeration. There are other potentially arguable cases that are not excluded by the enumeration. For example, the enumeration states that the promisee in a contract for the benefit of a third party may sue as real party in interest; it does not say, because it is obvious, that the third-party beneficiary may sue (when the applicable law gives him that right.)

The rule adds to the illustrative list of real parties in interest a bailee—meaning, of course, a bailee suing on behalf of the bailor with respect to the property bailed. (When the possessor of property other than the owner sues for an invasion of the possessory interest he is the real party in interest.) The word "bailee" is added primarily to preserve the admiralty practice whereby the owner of a vessel as bailee of the cargo, or the master of the vessel as bailee of both vessel and cargo, sues for damage to either property interest or both. But there is no reason to limit such a provision to maritime situations. The owner of a warehouse in which household furniture is stored is equally entitled to sue on behalf of the numerous owners of the furniture stored. Cf. *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947).

The provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after the objection has been raised, for ratification, substitution, etc., is added simply in the interests of justice. In its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.

This provision keeps pace with the law as it is actually developing. Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed—in both maritime and nonmaritime cases. See *Levinson* v. *Deupree,* 345 U.S. 648 (1953); *Link Aviation, Inc.* v. *Downs,* 325 F.2d 613 (D.C.Cir. 1963). The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. It does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the at-

torney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension of the limitation period. It does not even mean, when an action is filed by the personal representative of John Smith, of Buffalo, in the good faith belief that he was aboard the flight, that upon discovery that Smith is alive and well, having missed the fatal flight, the representative of James Brown, of San Francisco, an actual victim, can be substituted to take advantage of the suspension of the limitation period. It is, in cases of this sort, intended to insure against forfeiture and injustice—in short, to codify in broad terms the salutary principle of *Levinson* v. *Deupree*, 345 U.S. 648 (1953), and *Link Aviation, Inc.* v. *Downs*, 325 F.2d 613 (D.C.Cir. 1963).

AMENDMENTS

1948—The amendment effective October 20, 1949, deleted the words "Rule 66" at the end of subdivision (b) and substituted the words "Title 28, U.S. C., §§ 754 and 959(a)".

CROSS REFERENCES

Action by—
One or more on behalf of class, see rule 23.
United States for use of materialmen on public building contracts, see section 270b of Title 40, Public Buildings, Property, and Works.
Perpetuation of testimony of minor or incompetent, see rule 27.
Secretary of the Treasury, capacity to sue or be sued under Housing Act of 1949, see section 1456 of Title 42, The Public Health and Welfare.
Perpetuation of testimony of minor or incompetent, see rule 27.

Rule 18. Joinder of Claims and Remedies

(a) Joinder of claims

A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.

(b) Joinder of remedies; fraudulent conveyanees

Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In partlcular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). 1. Recent development, both in code and common law states, has been toward unlimited joinder of actions. See fli.Rev.Stat. (1937) ch. 110, § 168; N.J.S.A. 2:27-37, as modified by N.J.Sup.Ct.Rules, Rule 21, 2 N.J.Misc. 1208 (1924); N.Y.C.P.A. (1937) § 258 as amended by Laws of 1935, ch. 339.

2. This provision for joinder of actions has been patterned upon former Equlty Rule 26 (Joinder of Causes of Action) and broadened to include multiple parties. Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 18, r.r. 1-9 (noting rules 1 and 6). The earlier American codes set forth classes of joinder, following the now abandoned New York rule. See N.Y.C.P.A. § 258 before amended in 1935; Compare Kan.Gen.Stat.Ann. (1935) § 60-601; Wis.Stat. (1935) § 263.04 for the more liberal practice.

3. The provisions of this rule for the joinder of claims are subject to Rule 82 (Jurisdiction and Venue Unaffected). For the jurisdictional aspects of joinder of claims, see Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure (1936), 45 Yale L.J. 393, 397—410. For separate trials of joined claims, see Rule 42(b).

Note to Subdivision (b). This rule is inserted to make it clear that in a single action a party should be accorded all the relief to which he is entitled regardless of whether it is legal or equitable or both. This necessarily includes a deficiency judgment in foreclosure actions formerly provided for in former Equity Rule 10 (Decree for Deficiency in Foreclosures, Etc.). In respect to fraudulent conveyances the rule changes the former rule requiring a prior judgment against the owner (*Braun* v. *American Laundry Mach. Co.*, 56 F.2d 197 (S.D.N.Y. 1932)) to conform to the provisions of the Uniform Fraudulent Conveyance Act, §§ 9 and 10. See McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L.Rev. 404, 444 (1933).

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

The Rules "proceed upon the theory that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only from trying two or more matters together which have little or nothing in common." Sunderland, The New Federal Rules, 45 W.Va.L.Q. 5, 13 (1938); see Clark, Code Pleading 58 (2d ed. 1947). Accordingly, Rule 18(a) has permitted a party to plead multiple claims of all types against an opposing party, subject to the court's power to direct an appropriate procedure for trying the claims. See Rules 42(b). 20(b), 21.

The liberal policy regarding joinder of claims in the pleadings extends to cases with multiple parties. However, the language used in the second sentence of Rule 18(a)—"if the requirements of Rules 19 [necessary joinder of parties], 20 [permissive joinder of parties], and 22 [interpleader] are satisfied"—has led some courts to infer that the rules regulating joinder of parties are intended to carry back to Rule 18(a) and to impose some special limits on joinder of claims in multiparty cases. In particular, Rule 20(a) has been read as restricting the operation of Rule 18(a) in certain situations in which a number of parties have been permissively joined in an action. In *Federal Housing Admr.* v. *Christianson*, 26 F.Supp. 419 (D.Conn. 1939), the indorsee of two notes sued the three comakers of one note, and sought to join in the action a count on a second note which had been made by two of the three defendants. There was no doubt about the propriety of the joinder of the three parties defendant, for a right to relief was being asserted against all three defendants which arose out of a single "transaction" (the first note) and a question of fact or law "common" to all three defendants would arise in the action. See the text of Rule 20(a). The court, however, refused to allow the joinder of the count on the second note, on the ground that this right to relief, assumed to arise from a distinct transaction, did not involve a question common to all the defendants but only two of them. For analysis of the Christianson case and other authorities, see 2 Barron & Holtzoff, Federal Practice & Procedure, § 533.1 (Wright ed. 1961); 3 Moore's Federal Practice, par. 18.04[3] (2d ed. 1963).

If the court's view is followed, it becomes necessary to enter at the pleading stage into speculations about the exact relation between the claim sought to be joined against fewer than all the defendants properly joined in the action, and the claims asserted against all the defendants. Cf. Wright, Joinder of Claims and Parties Under Modern Pleading Rules, 36 Minn.L.Rev. 580, 605-06 (1952). Thus if it could be found in the Christianson situation that the claim on the second note arose out of the same transaction as the claim on the first or out of a transaction forming part of a "series," and that any question of fact or law with respect to the second note also arose with regard to the

first, it would be held that the claim on the second note could be joined in the complaint. See 2 Barron & Holtzoff, supra, at 199; see also id. at 198 n. 60.4; cf. 3 Moore's Federal Practice, supra, at 1811. Such pleading niceties provide a basis for delaying and wasteful maneuver. It is more compatible with the design of the Rules to allow the claim to be joined in the pleading, leaving the question of possible separate trial of that claim to be later decided. See 2 Barron & Holtzoff, supra, § 533.1; Wright, supra, 36 Minn.L.Rev. at 604-11; Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv. 874, 970-71 (1958); Commentary, Relation Between Joinder of Parties and Joinder of Claims, 5 F.R.Serv. 822 (1942). It is instructive to note that the court in the Christianson case, while holding that the claim on the second note could not be joined as a matter of pleading, held open the possibility that both claims would later be consolidated for trial under Rule 42(a). See 26 F.Supp. 419.

Rule 18(a) is now amended not only to overcome the Christianson decision and similar authority, but also to state clearly as a comprehensive proposition, that a party asserting a claim (an original claim, counterclaim, cross-claim, or third-party claim) may join as many claims as he has against an opposing party. See *Noland Co., Inc.* v. *Graver Tank & Mfg. Co.*, 301 F.2d 43, 49-51 (4th Cir. 1962); but cf. *C. W. Humphrey Co.* v. *Security Alum. Co.*, 31 F.R.D. 41 (E.D.Mich. 1962) This permitted joinder of claims is not affected by the fact that there are multiple parties in the action. The joinder of parties is governed by other rules operating independently.

It is emphasized that amended Rule 18(a) deals only with pleading. As already indicated, a claim properly joined as a matter of pleading need not be proceeded with together with the other claim if fairness or convenience justifies separate treatment.

Amended Rule 18(a), like the rule prior to amendment, does not purport to deal with questions of jurisdiction or venue which may arise with respect to claims properly joined as a matter of pleading. See Rule 82.

See also the amendment of Rule 20(a) and the Advisory Committee's Note thereto.

Free joinder of claims and remedies is one of the basic purposes of unification of the admiralty and civil procedure. The amendment accordingly provides for the inclusion in the rule of maritime claims as well as those which are legal and equitable in character.

CROSS REFERENCES

Counterclaims, see rule 13.
General rules of pleading, see rule 8.
One form of action, see rule 2.
Separate trial of joined claims, see rule 42.
Severance of claim against party, see rule 21.

FORMS

Claim for debt and to set aside fraudulent conveyance, see form 13, Appendix of Forms.

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be joined if feasible

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by court whenever joinder not feasible

If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading reasons for nonjoinder

A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of class actions

This rule is subject to the provisions of Rule 23.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). The first sentence with verbal differences (e.g., "united" interest for "joint" interest) is to be found in former Equity Rule 37 (Parties Generally—Intervention). Such compulsory joinder provisions are common. Compare Alaska Comp. Laws (1933) § 3392 (containing in same sentence a "class suit" provision); Wyo.Rev.Stat.Ann. (Courtright, 1931) § 89-515 (immediately followed by "class suit" provisions, § 89-516). See also former Equity Rule 42 (Joint and Several Demands). For example of a proper case for involuntary plaintiff, see *Independent Wireless Telegraph Co.* v. *Radio Corp. of America*, 269 U.S. 459, 46 S.Ct. 166, 70 L.Ed. 357 (1926).

The joinder provisions of this rule are subject to Rule 82 (Jurisdiction and Venue Unaffected).

Note to Subdivision (b). For the substance of this rule see former Equity Rule 39 (Absence of Persons Who Would be Proper Parties) and U.S.C., Title 28, former § 111 (now § 1391) (When part of several defendants cannot be served); *Camp* v. *Gress*, 250 U.S. 308, 39 S.Ct. 478, 63 L.Ed. 997 (1919). See also the second and third sentences of former Equity Rule 37 (Parties Generally—Intervention).

Note to Subdivision (c). For the substance of this rule see the fourth subdivision of former Equity Rule 25 (Bill of Complaint—Contents).

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

General Considerations

Whenever feasible, the persons materially interested in the subject of an action—see the more detailed description of these persons in the discussion of new subdivision (a) below—should be joined as parties so that

they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished—a situation which may be encountered in Federal courts because of limitations on service of process, subject matter jurisdiction, and venue—the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication ouly between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

Defects in the Original Rule

The foregoing propositions were well understood in the older equity practice, see Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Colum.L.Rev. 1254 (1961), and Rule 19 could be and often was applied in consonance with them. But experience showed that the rule was defective in its phrasing and did not point clearly to the proper basis of decision.

Textual defects.—(1) The expression "persons • • • who ought to be parties if complete relief is to be accorded between those already parties," appearing in original subdivision (b), was apparently intended as a description of the persons whom it would be desirable to join in the action, all questions of feasibility of joinder being put to one side; but it was not adequately descriptive of those persons.

(2) The word "Indispensable," appearing in original subdivision (b), was apparently intended as an inclusive reference to the interested persons in whose absence it would be advisable, all factors having been considered, to dismiss the action. Yet the sentence implied that there might be interested persons, not "indispensable," in whose absence the action ought also to be dismissed. Further, it seemed at least superficially plausible to equate the word "indispensable" with the expression "having a joint intorest," appearing in subdivision (a). See *United States* v. *Washington Inst. of Tech., Inc.*, 138 F.2d 25, 26 (3d Cir. 1943); cf. *Chidester* v. *City of Newark*, 162 F.2d 598 (3d Cir. 1947). But persons holding an interest technically "joint" are not always so related to an action that it would be unwise to proceed without joining all of them, whereas persons holding an interest not technically "joint" may have this relation to an action. See Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich.L.Rev. 327, 356 ff., 483 (1957).

(3) The use of "indispensable" and "joint interest" in the context of original Rule 19 directed attention to the technical or abstract character of the rights or obligations of the persons whose joinder was in question, and correspondingly distracted attention from the pragmatic considerations which should be controlling.

(4) The original rule, in dealing with the feasibility of joining a person as a party to the action, besides referring to whether the person was "subject to the jurisdiction of the court as to both service of process and venue," spoke of whether the person could be made a party "without depriving the court of jurisdiction of the parties before it." The second quoted expression used "jurisdiction" in the sense of the competence of the court over the subject matter of the action, and in this sense the expression was apt. However, by a familiar confusion, the expression seems to have suggested to some that the absence from the lawsuit of a person who was "indispensable" or "who ought to be [a] part[y]" itself deprived the court of the power to adjudicate as between the parties already joined. See *Samuel Goldwyn, Inc.* v. *United Artists Corp.*, 113 F.2d 703, 707 (3d Cir. 1940); *McArthur* v. *Rosenbaum Co. of Pittsburgh*, 180 F.2d 617, 621 (3d Cir. 1949); cf. *Calcote* v. *Texas Pac. Coal & Oil Co.*, 157 F.2d 216 (5th Cir. 1946), cert. denied, 329 U.S. 782 (1946), noted in 56 Yale L.J. 1088 (1947); Reed, supra, 55 Mich.L.Rev. at 332-34.

Failure to point to correct basis of decision. The original rule did not state affirmatively what factors were relevant in deciding whether the action should proceed or be dismissed when joinder of interested persons was infeasible. In some instances courts did not undertake the relevant inquiry or were misled by the "jurisdiction" fallacy. In other instances there was undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated by the shaping of final relief or other precautions.

Although these difficulties cannot be said to have been general analysis of the cases showed that there was good reason for attempting to strengthen the rule. The literature also indicated how the rule should be reformed. See Reed, supra (discussion of the important case of *Shields* v. *Barrow*, 17 How. (58 U.S.) 130 (1854), appears at 55 Mich.L.Rev., p. 340 ff.); Hazard, supra; N.Y. Temporary Comm. on Courts, First Preliminary Report, Legis. Doc. 1957, No. 6(b), pp. 28, 233; N.Y. Judicial Council, Twelfth Ann. Rep., Legis. Doc. 1946, No. 17, p. 163; Joint Comm. on Michigan Procedural Revision, Final Report, Pt. III, p. 69 (1960); Note, Indispensable Parties in the Federal Courts, 65 Harv.L.Rev. 1050 (1952); Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv.L.Rev. 874, 879 (1958); Mich.Gen.Court Rules, R. 205 (effective Jan. 1, 1963); N.Y.Civ.Prac.Law & Rules, § 1001 (effective Sept. 1, 1963).

The Amended Rule

New subdivision (a) defines the persons whose joinder in the action is desirable. Clause (1) stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or "hollow" rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter. Clause (2)(i) recognizes the importance of protecting the person whose joinder is in question against the pratical prejudice to him which may arise through a disposition of the action in his absence. Clause (2)(ii) recognizes the need for considering whether a party may be left, after the adjudication, in a position where a person not joined can subject him to a double or otherwise inconsistent liability. See Reed, supra, 55 Mich.L.Rev. at 330, 338; Note, supra, 65 Harv.L.Rev. at 1052-57; Developments in the Law, supra, 71 Harv.L.Rev. at 881-85.

The subdivision (a) definition of persons to be joined is not couched in terms of the abstract nature of their interests—"joint," "united," "separable," or the like. See N.Y. Temporary Comm. on Courts, First Preliminary Report, supra; Developments in the Law, supra, at 880. It should be noted particularly, however, that the description is not at variance with the settled authorities holding that a tortfeasor with the usual "joint-and-several" liability is merely a permissive party to an action against another with like liability. See 3 Moore's Federal Practice 2153 (2d ed. 1963); 2 Barron & Holtzoff, Federal Practice & Procedure § 513.8 (Wright ed. 1961). Joinder of these tortfeasors continues to be regulated by Rule 20; compare Rule 14 on third-party practice.

If a person as described in subdivision (a)(1)(2) is amenable to service of process and his joinder would not deprive the court of jurisdiction in the sense of competence over the action, he should be joined as a

party; and if he has not been joined, the court should order him to be brought into the action. If a party joined has a valid objection to the venue and chooses to assert it, he will be dismissed from the action.

Subdivision (b).—When a person as described in subdivision (a)(1)–(2) cannot be made a party, the court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed. That this decision is to be made in the light of pragmatic considerations has often been acknowledged by the courts. See *Roos* v. *Texas Co.*, 23 F.2d 171 (2d Cir. 1927), cert. denied, 277 U.S. 587 (1928); *Niles-Bement-Pond Co.* v. *Iron Moulders, Union*, 254 U.S. 77, 80 (1920). The subdivision sets out four relevant considerations drawn from the experience revealed in the decided cases. The factors are to a certain extent overlapping, and they are not intended to exclude other considerations which may be applicable in particular situations.

The first factor brings in a consideration of what a judgment in the action would mean to the absentee. Would the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor? The possible collateral consequences of the judgment upon the parties already joined are also to be appraised. Would any party be exposed to a fresh action by the absentee, and if so, how serious is the threat? See the elaborate discussion in Reed, supra; cf. *A. L. Smith Iron Co.* v. *Dickson*, 141 F.2d 3 (2d Cir. 1944); *Caldwell Mfg. Co.* v. *Unique Balance Co.*, 18 F.R.D. 258 (S.D.N.Y. 1955).

The second factor calls attention to the measures by which prejudice may be averted or lessened. The "shaping of relief" is a familiar expedient to this end. See, e.g., the award of money damages in lieu of specific relief where the latter might affect an absentee adversely. *Ward* v. *Deavers*, 203 F.2d 72 (D.C.Cir. 1953); *Miller & Lux, Inc.* v. *Nickel*, 141 F.Supp. 41 (N.D.Calif. 1956). On the use of "protective provisions," see *Roos* v. *Texas Co.*, supra; *Atwood* v. *Rhode Island Hosp. Trust Co.*, 275 Fed. 513, 519 (1st Cir. 1921), cert. denied, 257 U.S. 661 (1922); cf. *Stumpf* v. *Fidelity Gas Co.*, 294 F.2d 886 (9th Cir. 1961); and the general statement in *National Licorice Co.* v. *Labor Board*, 309 U.S. 350, 363 (1940).

Sometimes the party is himself able to take measures to avoid prejudice. Thus a defendant faced with a prospect of a second suit by an absentee may be in a position to bring the latter into the action by defensive interpleader. See *Hudson* v. *Newell*, 172 F.2d 848, 852 mod., 176 F.2d 546 (5th Cir. 1949); *Gauss* v. *Kirk*, 198 F.2d 83, 86 (D.C.Cir. 1952); *Abel* v. *Brayton Flying Service, Inc.*, 248 F.2d 713, 716 (5th Cir. 1957) (suggestion of possibility of counterclaim under Rule 13(h)); cf. *Parker Rust-Proof Co.* v. *Western Union Tel. Co.*, 105 F.2d 976 (2d Cir. 1939) cert. denied, 308 U.S. 597 (1939). See also the absentee may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening on an ancillary basis. See Developments in the Law, supra, 71 Harv.L.Rev. at 882; Annot., Intervention or Subsequent Joinder of Parties as Affecting Jurisdiction of Federal Court Based on Diversity of Citizenship, 134 A.L.R. 335 (1941); *Johnson* v. *Middleton*, 175 F.2d 535 (7th Cir. 1949); *Kentucky Nat. Gas Corp.* v. *Duggins*, 165 F.2d 1011 (6th Cir. 1948); *McComb* v. *McCormack*, 159 F.2d 219 (5th Cir. 1947). The court should consider whether this, in turn, would impose undue hardship on the absentee. (For the possibility of the court's informing an absentee of the pendency of the action, see comment under subdivision (c) below.)

The third factor—whether an "adequate" judgment can be rendered in the absence of a given person—calls attention to the extent of the relief that can be accorded among the parties joined. It meshes with the other factors, especially the "shaping of relief" mentioned under the second factor. Cf. *Kroese* v. *General Steel Castings Corp.*, 179 F.2d 760 (3d Cir. 1949), cert. denied, 339 U.S. 983 (1950).

The fourth factor, looking to the practical effects of a dismissal, indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible. See *Fitzgerald* v. *Haynes*, 241 F.2d 417, 420 (3d Cir. 1957); *Fouke* v. *Schenewerk*, 197 F.2d 234, 236 (5th Cir. 1952); cf. *Warfield* v. *Marks*, 190 F.2d 178 (5th Cir. 1951).

The subdivision uses the word "indispensable" ouly in a conclusory sense, that is, a person is "regarded as indispensable" when he cannot be made a party and, upon consideration of the factors above mention, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it.

A person may be added as a party at any stage of the action on motion or on the court's initiative (see Rule 21); and a motion to dismiss, on the ground that a person has not been joined and justice requires that the action should not proceed in his absence, may be made as late as the trial on the merits (see Rule 12(h)(2), as amended; cf. Rule 12(b)(7), as amended). However, when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person (subdivision (a)(2)(ii)), and is not seeking vicariously to protect the absent person against a prejudicial judgment (subdivision (a)(2)(i)), his undue delay in making the motion can properly be counted against him as a reason for denying the motion. A joinder question should be decided with reasonable promptness, but decision may properly be deferred if adequate information is not available at the time. Thus the relationship of an absent person to the action, and the practical effects of an adjudication upon him and others, may not be sufficiently revealed at the pleading stage; in such a case it would be appropriate to defer decision until the action was further advanced. Cf. Rule 12(d).

The amended rule makes no special provision for the problem arising in suits against subordinate Federal officials where it has often been set up as a defense that some superior officer must be joined. Frequently this defense has been accompanied by or intermingled with defenses of sovereign community or lack of consent of the United States to sult. So far as the issue of joinder can be isolated from the rest, the new subdivision seems better adapted to handle it than the predecessor provision. See the discussion in *Johnson* v. *Kirkland*, 290 F.2d 440, 446–47 (5th Cir. 1961) (stressing the practical orientation of the decisions); *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 54 (1955). Recent legislation, P.L. 87-748, 76 Stat. 744, approved October 5, 1962, adding §§ 1361, 1391(e) to Title 28, U.S.C., vests original jurisdiction in the District Courts over actions in the nature of mandamus to compel officials of the United States to perform their legal duties, and extends the range of service of process and liberalizes venue in these actions. If, then, it is found that a particular official should be joined in the action, the legislation will make it easy to bring him in.

Subdivision (c) parallels the predecessor subdivision (c) of Rule 19. In some situations it may be desirable to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court in its discretion may itself convey this information by directing a letter or other informal notice to the absentee.

Subdivision (d) repeats the exception contained in the first clause of the predecessor subdivision (a).

CROSS REFERENCES

Class actions, see rule 23.

Indispensable party, defense of failure to join, see rule 12.

Interpleader, see rule 22.

Intervention, see rule 24.

Jurisdiction and venue unaffected by these rules, see rule 82.

Lien enforcement, ordering absent defendant to appear or plead, see section 1655 of this title.

Misjoinder and nonjoinder of parties, see rule 21.

Permissive joinder of parties, see rule 20.

Substitution of parties, see rule 25.

Rule 20. Permissive Joinder of Parties

(a) Permissive joinder

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate trials

The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

The provisions for joinder here stated are in substance the provisions found in England, California, Illinois, New Jersey, and New York. They represent only a moderate expansion of the present federal equity practice to cover both law and equity actions.

With this rule compare also former Equity Rules 26 (Joinder of Causes of Action), 37 (Parties Generally—Intervention), 40 (Nominal Parties), and 42 (Joint and Several Demands).

The provisions of this rule for the joinder of parties are subject to Rule 82 (Jurisdiction and Venue Unaffected).

Note to Subdivision (a). The first sentence is derived from English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 1. Compare Calif.Code Civ.Proc. (Deering, 1937) §§ 378, 379a; Ill.Rev.Stat. (1937) ch. 110, §§ 147-148; N.J.Comp.Stat. (2 Cum.Supp., 1911-1924), N.Y.C.P.A. (1937) §§ 209, 211. The second sentence is derived from English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 4. The third sentence is derived from O. 16, r. 5, and the fourth from O. 16, r.r. 1 and 4.

Note to Subdivision (b). This is derived from English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r.r. 1 and 5.

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

See the amendment of Rule 18(a) and the Advisory Committee's Note thereto. It has been thought that a lack of clarity in the antecedent of the word "them," as it appeared in two places in Rule 20(a), contributed to the view, taken by some courts, that this rule limited the joinder of claims in certain situations of permissive party joinder. Although the amendment of Rule 18(a) should make clear that this view is untenable, it has been considered advisable to amend Rule 20(a) to eliminate any ambiguity. See 2 Barron & Holtzoff, Federal Practice & Procedure 202 (Wright Ed. 1961).

A basic purpose of unification of admiralty and civil procedure is to reduce barriers to joinder; hence the reference to "any vessel," etc.

CROSS REFERENCES

Collusive and improper joinder of parties, jurisdiction of district courts, see section 1359 of this title.
Interpleader, see rule 22.
Intervention, see rule 24.
Misjoinder and nonjoinder of parties, see rule 21.
Necessary joinder of parties, see rule 19.
Substitution of parties, see rule 25,

Rule 21. Misjoinder and Non-Joinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

NOTES OF ADVISORY COMMITTEE ON RULES

See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 11. See also Equity Rules 43 (Defect of Parties—Resisting Objection) and 44 (Defect of Parties—Tardy Objection).

For separate trials see Rules 13(i) (Counterclaims and Cross-Claims: Separate Trials; Separate Judgments), 20(b) (Permissive Joinder of Parties: Separate Trials), and 42(b) (Separate Trials, generally) and the note to the latter rule.

CROSS REFERENCES

Collusive and improper joinder of parties, jurisdiction of district courts, see section 1359 of this title.
Intervention of parties, see rule 24.
Necessary joinder of parties, see rule 19.
Permissive joinder of parties, see rule 20.
Removal of causes, realignment of parties, see section 1447 of this title.

Rule 22. Interpleader

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949.)

NOTES OF ADVISORY COMMITTEE ON RULES

The first paragraph provides for interpleader relief along the newer and more liberal lines of joinder in the alternative. It avoids the confusion and restrictions that developed around actions of strict interpleader and actions in the nature of interpleader. Compare *John Hancock Mutual Life Insurance Co.* v.

Kegan et al., 22 F.Supp. 326 (D.C.Md., 1938). It does not change the rules on service of process, jurisdiction, and venue, as established by judicial decision.

The second paragraph allows an action to be brought under the recent interpleader statute when applicable. By this paragraph all remedies under the statute are continued, but the manner of obtaining them is in accordance with these rules. For temporary restraining orders and preliminary injunctions under this statute, see Rule 65(e).

This rule substantially continues such statutory provisions as U.S.C., Title 38, § 445 (Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions) (actions upon veterans' contracts of insurance with the United States), providing for interpleader by the United States where it acknowledges indebtedness under a contract of insurance with the United States; U.S.C., Title 49, § 97 (Interpleader of conflicting claimants) (by carrier which has issued bill of lading). See Chafee, The Federal Interpleader Act of 1936: I and II (1936), 45 Yale L.J. 963, 1161.

AMENDMENTS

1948—The amendment effective October 20, 1949, substituted the reference to "Title 28, U.S.C., §§ 1335, 1397, and 2361," at the end of the first sentence of paragraph (2), for the reference te "Section 24(26) of the Judicial Code, as amended, U.S.C., Title 28, § 41(26)." The amendment also substituted the words "those provisions" in the second sentence of paragraph (2) for the words "that section."

Rule 23. Class Actions

(a) Prerequisites to a class action

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class actions maintainable

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive or the interests of the other members not parties to the adjudications or substantially impair or impeded their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in conduct of actions

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that

the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or compromise

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). This is a substantial restatement of former Equity Rule 38 (Representatives of Class) as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable. For a general analysis of class actions, effect of judgment, and requisites of jurisdiction see Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Georgetown L.J. 551, 570 et seq. (1937); Moore and Cohn, Federal Class Actions, 32 Ill.L.Rev. 307 (1937); Moore and Cohn, Federal Class Actions—Jurisdiction and Effect of Judgment, 32 Ill.L.Rev. 555—567 (1938); Lesar, Class Suits and the Federal Rules, 22 Minn.L.Rev. 34 (1937); cf. Arnold and James, Cases on Triais, Judgments and Appeals (1936) 175; and see Blume, Jurisdictional Amount in Representative Suits, 15 Minn.L.Rev. 501 (1931).

The general test of former Equity Rule 38 (Representatives of Class) that the question should be "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court," is a common test. For states which require the two elements of a common or general interest and numerous persons, as provided for in former Equity Rule 38, see Del.Ch.Rule 113; Fla.Comp.Gen.Laws Ann. (Supp., 1936) § 4918 (7); Georgia Code (1933) § 37-1002, and see English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 9. For statutory provisions providing for class actions when the question is one of common or general interest or when the parties are numerous, see Ala.Code Ann. (Michie, 1928) § 5701; 2 Ind.Stat.Ann. (Burns, 1933) § 2-220; N.Y.C.P.A. (1937) § 195; Wis.Stat. (1935) § 260.12. These statutes have, however, been uniformly construed as though phrased in the conjunctive. See *Garfein* v. *Stiglitz*, 260 Ky. 430, 86 S.W.2d 155 (1935). The rule adopts the test of former Equity Rule 38, but defines what constitutes a "common or general interest". Compare with code provisions which make the action dependent upon the propriety of joinder of the parties. See Blume, The "Common Questions" Principle in the Code Provision for Representative Suits, 30 Mich.L.Rev. 878 (1932). For discussion of what constitutes "numerous persons" see Wheaton, Representative Suits Involving Numerous Litigants, 19 Corn.L.Q. 399 (1934); Note, 36 Harv.L.Rev. 89 (1922).

Clause (1), Joint, Common, or Secondary Right. This clause is illustrated in actions brought by or against representatives of an unincorporated association. See *Oster* v. *Brotherhood of Locomotive Firemen and Enginemen*, 271 Pa. 419, 114 Atl. 377 (1921); *Pickett* v. *Walsh*, 192 Mass. 572, 78 N.E. 753, 6 L.R.A., N.S., 1067 (1906); *Colt* v. *Hicks*, 97 Ind.App. 177, 179 N.E. 335 (1932). Compare Rule 17(b) as to when an unincorporated association has capacity to sue or be sued in its common name; *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975, 27 A.L.R. 762 (1922) (an unincorporated association was sued as an entity for the purpose of enforcing against it a federal substantive right); Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Georgetown L.J. 551, 566 (for discussion of jurisdictional requlsites when an unincorporated association sues or is sued in its common name and jurisdiction is founded upon diversity of citizenship). For an action brought by representatives of one group against representatives of another group for distribution of a fund held by an unincorporated association, see *Smith* v. *Swormstedt*, 16 How. 288, 14 L.Ed. 942 (U.S. 1853). Compare *Christopher, et al.* v. *Brusselback*, 302 U.S. 500, 58 S.Ct. 350, 82 L.Ed. 388 (1938).

For an action to enforce rights held in common by policyholders against the corporate issuer of the policies, see *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673 (1921). See also *Terry* v. *Little*, 101 U.S. 216, 25 L.Ed. 864 (1880); *John A. Roebling's Sons Co.* v. *Kinnicutt*, 248 Fed. 596 (D.C.N.Y., 1917) dealing with the right held in common by creditors to enforce the statutory liability of stockholders.

Typical of a secondary action is a suit by stockholders to enforce a corporate right. For discussion of the general nature of these actions see *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936); Glenn, The Stockholder's Suit—Corporate and Individual Grievances, 33 Yale L.J. 580 (1924); McLaughlin, Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit, 46 Yale L.J. 421 (1937). See also Subdivision (b) of this rule which deals with Shareholder's Action; Note, 15 Minn.L.Rev. 453 (1931).

Clause (2). A creditor's action for liquidation or reorganization of a corporation is illustrative of this clause. An action by a stockholder against certain named defendants as representatives of numerous claimants presents a situation converse to the creditor's action.

Clause (3). See *Everglades Drainage League* v. *Napoleon Broward Drainage Dist.*, 253 Fed. 246 (D.C.Fla., 1918); *Gramling* v. *Maxwell*, 52 F.2d 256 (D.C.N.C., 1931), approved in 30 Mich.L.Rev. 624 (1932); *Skinner* v. *Mitchell*, 108 Kan. 861, 197 Pac. 569 (1921); *Duke of Bedford* v. *Ellis* (1901) A.C. 1, for class actions when there were numerous persons and there was only a question of law or fact common to them; and see Blume, The "Common Questions" Principle in the Code Provision for Representative Suits, 30 Mich.L.Rev. 878 (1932).

Note to Subdivision (b). This is former Equity Rule 27 (Stockholder's Bill) with verbal changes. See also *Hawes* v. *Oakland*, 104 U.S. 450, 26 L.Ed. 827 (1882) and former Equity Rule 94, promulgated January 23, 1882, 104 U.S. IX.

Note to Subdivision (c). See McLaughlin, Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit, 46 Yale L.J. 421 (1937).

SUPPLEMENTARY NOTE OF ADVISORY COMMITTEE REGARDING THIS RULE

Note. Subdivision (b), relating to secondary actions by shareholders, provides among other things, that in such an action the complainant "shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law . . ."

As a result of the decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (decided April 25, 1938, after this rule was promulgated by the Supreme Court, though before it took effect) a question has arisen as to whether the provision above quoted deals with a matter of substantive right or is a matter of procedure. If it is a matter of substantive law or right, then under *Erie R. Co.* v. *Tompkins* clause (1) may not be validly applied in cases pending in states whose local law permits a shareholder to maintain such actions, although not a shareholder at the time of the transactions complained of. The Advisory Committee, believing the question should be settled in the courts, proposes no change in Rule 23 but thinks rather that the situation should be explained in an appropriate note.

The rule has a long history. In *Hawes* v. *Oakland*, 1882, 104 U.S. 450, the Court held that a shareholder could not maintain such an action unless he owned shares at the time of the transactions complained of,

or unless they devolved on him by operation of law. At that time the decision in *Swift* v. *Tyson*, 1842, 16 Peters 1, was the law, and the federal courts considered themselves free to establish their own principles of equity jurisprudence, so the Court was not in 1882 and has not been, until *Erie R. Co.* v. *Tompkins* in 1938, concerned with the question whether *Hawes* v. *Oakland* dealt with substantive right or procedure.

Following the decision in *Hawes* v. *Oakland*, and at the same term, the Court, to implement its decision, adopted former Equity Rule 94, which contained the same provision above quoted from Rule 23 F.R.C.P. The provision in former Equity Rule 94 was later embodied in former Equity Rule 27, of which the present Rule 23 is substantially a copy.

In *City of Quincy* v. *Steel*, 1887, 120 U.S. 241, 245, 7 S.Ct. 520, the Court referring to *Hawes* v. *Oakland* said: "In order to give effect to the principles there laid down, this Court at that term adopted Rule 94 of the rules of practice for courts of equity of the United States."

Some other cases dealing with former Equity Rules 94 or 27 prior to the decision in *Erie R. Co.* v. *Tompkins* are *Dimpfel* v. *Ohio & Miss. R. R.*, 1884, 110 U.S. 209, 3 S.Ct. 573; *Illinois Central R. Co.* v. *Adams*, 1901, 180 U.S. 28, 34, 21 S.Ct. 251; *Venner* v. *Great Northern Ry.*, 1908, 209 U.S. 24, 30, 28 S.Ct. 328; *Jacobson* v. *General Motors Corp.*, S.D.N.Y. 1938, 22 F.Supp. 255, 257. These cases generally treat *Hawes* v. *Oakland* as establishing a "principle" of equity, or as dealing not with jurisdiction but with the "right" to maintain an action, or have said that the defense under the equity rule is analogous to the defense that the plaintiff has no "title" and results in a dismissal "for want of equity."

Those state decisions which held that a shareholder acquiring stock after the event may maintain a derivative action are founded on the view that it is a right belonging to the shareholder at the time of the transaction and which passes as a right to the subsequent purchaser. See *Pollitz* v. *Gould*, 1911, 202 N.Y. 11, 94 N.E. 1088.

The first case arising after the decision in *Erie R. Co.* v. *Tompkins*, in which this problem was involved, was *Summers* v. *Hearst*, S.D.N.Y. 1938, 23 F.Supp. 986. It concerned former Equity Rule 27, as Federal Rule 23 was not then in effect. In a well considered opinion Judge Leibell reviewed the decisions and said: "The federal cases that discuss this section of Rule 27 support the view that it states a principle of substantive law." He quoted *Pollitz* v. *Gould*, 1911, 202 N.Y. 11, 94 N.E. 1088, as saying that the United States Supreme Court "seems to have been more concerned with establishing this rule as one of practice than of substantive law" but that "whether it be regarded as establishing a principle of law or a rule of practice, this authority has been subsequently followed in the United States courts."

He then concluded that, although the federal decisions treat the equity rule as "stating a principle of substantive law", if former "Equity Rule 27 is to be modified or revoked in view of *Erie R. Co.* v. *Tompkins*, it is not the province of this Court to suggest it, much less impliedly to follow that course by disregarding the mandatory provisions of the Rule."

Some other federal decisions since 1938 touch the question.

In *Picard* v. *Sperry Corporation*, S.D.N.Y. 1941, 36 F.Supp. 1006, 1009-10, affirmed without opinion, C.C.A.2d, 1941, 120 F.2d 328, a shareholder, not such at the time of the transactions complained of, sought to intervene. The court held an intervenor was as much subject to Rule 23 as an original plaintiff; and that the requirement of Rule 23(b) was "a matter of practice," not substance, and applied in New York where the state law was otherwise, despite *Erie R. Co.* v. *Tompkins*. In *York* v. *Guaranty Trust Co. of New York*, C.C.A.2d, 1944, 143 F.2d 503, rev'd on other grounds, 1945, 65 S.Ct. 1464, the court said: "Restrictions on the bringing of stockholders' actions, such as those imposed by F.R.C.P. 23(b) or other state statutes are procedural," citing the Picard and other cases.

In *Gallup* v. *Caldwell*, C.C.A.3d, 1941, 120 F.2d 90, 95, arising in New Jersey, the point was raised but not decided, the court saying that it was not satisfied that the then New Jersey rule differed from Rule 23(b), and that "under the circumstances the proper course was to follow Rule 23(b)."

In *Mullins* v. *De Soto Securities Co.*, W.D.La. 1942, 45 F.Supp. 871, 878, the point was not decided, because the court found the Louisiana rule to be the same as that stated in Rule 23(b).

In *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, D.Del. 1941, 41 F.Supp. 334, 340, the court dealt only with another part of Rule 23(b), relating to prior demands on the stockholders and did not discuss *Erie R. Co.* v. *Tompkins*, or its effect on the rule.

In *Perrott* v. *United States Banking Corp.*, D.Del. 1944, 53 F.Supp. 953, it appeared that the Delaware law does not require the plaintiff to have owned shares at the time of the transaction complained of. The court sustained Rule 23(b), after discussion of the authorities, saying:

"It seems to me the rule does not go beyond procedure. * * * Simply because a particular plaintiff cannot qualify as a proper party to maintain such an action does not destroy or even whittle at the cause of action. The cause of action exists until a qualified plaintiff can get it started in a federal court."

In *Bankers Nat. Corp.* v. *Barr*, S.D.N.Y. 1945, 9 Fed.Rules Serv. 23b.11, Case 1, the court held Rule 23(b) to be one of procedure, but that whether the plaintiff was a stockholder was a substantive question to be settled by state law.

The New York rule, as stated in *Pollitz* v. *Gould*, supra, has been altered by an act of the New York Legislature, Chapter 667, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61, which provides that "in any action brought by a shareholder in the right of a . . . corporation, it must appear that the plaintiff was a stockholder at the time of the transaction of which he complains, or that his stock thereafter devolved upon him by operation of law." At the same time a further and separate provision was enacted, requiring under certain circumstances the giving of security for reasonable expenses and attorney's fees, to which security the corporation in whose right the action is brought and the defendants therein may have recourse. (Chapter 668, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61-b.) These provisions are aimed at so-called "strike" stockholders' suits and their attendant abuses. *Shielcrawt* v. *Moffett*, Ct.App. 1945, 294 N.Y. 180, 61 N.E.2d 435, rev'g 51 N.Y.S.2d 188, aff'g 49 N.Y.S.2d 64; *Noel Associates, Inc.* v. *Merrill*, Sup.Ct. 1944, 184 Misc. 646, 63 N.Y.S.2d 143.

Insofar as § 61 is concerned, it has been held that the section is procedural in nature. *Klum* v. *Clinton Trust Co.*, Sup.Ct. 1944, 183 Misc. 340, 48 N.Y.S.2d 267; *Noel Associates, Inc.* v. *Merrill*, supra. In the latter case the court pointed out that "The 1944 amendment to Section 61 rejected the rule laid down in the Pollitz case and substituted, in place thereof, in its precise language, the rule which has long prevailed in the Federal Courts and which is now Rule 23(b) . . ." There is, nevertheless, a difference of opinion regarding the application of the statute to pending actions. See *Klum* v. *Clinton Trust Co.*, supra (applicable); *Noel Associates, Inc.* v. *Merrill*, supra (inapplicable).

With respect to § 61-b, which may be regarded as a separate problem, *Noel Associates, Inc.* v. *Merrill*, supra, it has been held that even though the statute is procedural in nature—a matter not definitely decided—the Legislature evinced no intent that the provision should apply to actions pending when it became effective. *Shielcrawt* v. *Moffett*, supra. As to actions instituted after the effective date of the legislation, the constitutionality of § 61-b is in dispute. See *Wolf* v. *Atkinson*, Sup. Ct. 1944, 182 Misc. 675, 49 N.Y.S.2d 703 (constitutional); *Citron* v. *Mangel Stores Corp.*, Sup.Ct. 1944, 50 N.Y.S.2d 416 (unconstitutional); Zlinkoff, The

American Investor and the Constitutionality of Section 61-B of the New York General Corporation Law, 1945, 54 Yale L.J. 352.

New Jersey also enacted a statute, similar to Chapters 667 and 668 of the New York law. See P. L. 1945, Ch. 131, R.S.Cum.Supp. 14:3-15. The New Jersey provision similar to Chapter 668, § 61-b, differs, however, in that it specifically applies retroactively. It has been held that this provision is procedural and hence will not govern a pending action brought against a New Jersey corporation in the New York courts. *Shielcrawt* v. *Moffett*, Sup.Ct.N.Y. 1945, 184 Misc. 1074, 56 N.Y.S.2d 134.

See also generally, 2 Moore's Federal Practice, 1938, 2250-2253, and Cum.Supplement § 23.05.

The decisions here discussed show that the question is a debatable one, and that there is respectable authority for either view, with a recent trend towards the view that Rule 23(b)(1) is procedural. There is reason to say that the question is one which should not be decided by the Supreme Court ex parte, but left to await a judicial decision in a litigated case, and that in the light of the material in this note, the only inference to be drawn from a failure to amend Rule 23(b) would be that the question is postponed to await a litigated case.

The Advisory Committee is unanimously of the opinion that this course should be followed.

If, however, the final conclusion is that the rule deals with a matter of substantive right, then the rule should be amended by adding a provision that Rule 23(b)(1) does not apply in jurisdictions where state law permits a shareholder to maintain a secondary action, although he was not a shareholder at the time of the transactions of which he complains.

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amendable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. See Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo.L.J. 551, 570-76 (1937).

In practice, the terms "joint," "common," etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. See Chaffee, Some Problems of Equity 245-46, 256-57 (1950); Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. of Chi.L.Rev. 684, 707 & n. 73 (1941); Keeffe, Levy & Donovan, Lee Defeats Ben Hur, 33 Corn.L.Q. 327, 329-36 (1948); Developments in the Law: Multiparty Litigation in the Federal Courts, 71 Harv.L.Rev. 874, 931 (1958); Advisory Committee's Note to Rule 19, as amended. The courts had considerable difficulty with these terms. See, e.g., *Gullo* v. *Veterans' Coop. H. Assn.*, 13 F.R.D. 11 (D.D.C. 1952); *Shipley* v. *Pittsburgh & L. E. R. Co.*, 70 F.Supp. 870 (W.D.Pa. 1947); *Deckert* v. *Independence Shares Corp.*, 27 F.Supp. 763 (E.D.Pa. 1939), rev'd, 108 F.2d 51 (3d Cir. 1939), rev'd, 311 U.S. 282 (1940), on remand, 39 F.Supp. 592 (E.D.Pa. 1941), rev'd sub nom. *Pennsylvania Co. for Ins. on Lives* v. *Deckert*, 123 F.2d 979 (3d Cir. 1941) (see Chafee, supra, at 264-65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as "true" or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word "several" of coherent meaning. See, e.g., *System Federation No. 91* v. *Reed*, 180 F.2d 991 (6th Cir. 1950); *Wilson* v. *City of Paducah*, 100 F.Supp. 116 (W.D.Ky. 1951); *Citizens Banking Co.* v. *Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944); *Redmond* v. *Commerce Trust Co.*, 144 F.2d 140 (8th Cir. 1944), cert. denied, 323 U.S. 776 (1944); *United States* v. *American Optical Co.*, 97 F.Supp. 66 (N.D.Ill. 1951); (*National Hairdressers' & C. Assn.* v. *Philad. Co.*, 34 F.Supp. 264 (D.Del. 1940); 41 F.Supp. 701 (D.Del. 1940), aff'd mem., 129 F.2d 1020 (3d Cir. 1942). Second, we find cases classified by the courts as "spurious" in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, e.g., *Knapp* v. *Bankers Sec. Corp.*, 17 F.R.D. 245 (E.D.Pa. 1954); aff'd 230 F.2d 717 (3d Cir. 1956); *Giesecke* v. *Denver Tramway Corp.*, 81 F.Supp. 957 (D.Del. 1949); *York* v. *Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), rev'd on grounds not here relevant, 326 U.S. 90 (1945) (see Chafee, supra, at 208); cf. *Webster Eisenlohr, Inc.* v. *Kalodner*, 145 F.2d 316, 320 (3d Cir. 1944), cert. denied, 325 U.S. 807 (1945). But cf. the early decisions, *Duke of Bedford* v. *Ellis* [1901], A.C. 1; *Sheffield Waterworks* v. *Yeomans*, L.R. 2 Ch.App. 8 (1866); *Brown* v. *Vermuden*, 1 Ch.Cas. 272, 22 Eng.Rep. 796 (1676).

The "spurious" action envisaged by original Rule 23 was in any event an anomaly because, although denominated a "class" action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the "spurious" category that it would invite decisions that a member of the "class" could, like a memher of the class in a "true" or "hybrid" action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 Moore's Federal Practice, pars. 23.10[1], 23.12 (2d ed. 1963). These results were attained in some instances but not in others. On the statute of limitations, see *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), pet. cert. dism., 371 U.S. 801 (1963); but cf. *P. W. Husserl, Inc.* v. *Newman*, 25 F.R.D. 264 (S.D.N.Y. 1960); *Athas* v. *Day*, 161 F.Supp. 916 (D.Colo. 1958). On ancillary intervention, see *Amen* v. *Black*, 234 F.2d 12 (10th Cir. 1956), cert. granted, 352 U.S. 888 (1956), dism. on stip., 355 U.S. 600 (1958); but. cf. *Wagner* v. *Kemper*, 13 F.R.D. 128 (W.D.Mo. 1952). The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn no more basic considerations. See discussion of subdivision (c)(1) below.

Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, supra, at 230-31; Keeffe, Levy & Donovan, supra; Developments in the Law, supra, 71 Harv.L.Rev. at 937-38; Note, Binding Effect of Class Actions, 67 Harv.L.Rev. 1059, 1062-65 (1954); Note, Federal Class Actions: A Suggested Revision of Rule 23, 46 Colum.L.Rev. 818, 833-36 (1946); Mich.Gen.Court R. 208.4 (effective Jan. 1, 1963); Idaho R.Civ.P. 23(d); Minn.R.Civ.P. 23.04; N.Dak.R.Civ.P. 23(d).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (a) states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder of the members impractica-

ble, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, Revision of Procedure; Some Problems in Class Actions, 9 Buffalo L.Rev. 433, 458–59 (1960); 2 Barron & Holtzoff, Federal Practice & Procedure § 562, at 265, § 572, at 351–52 (Wright ed. 1961). These are necessary but not sufficient conditions for a class action. See, e.g., *Giordano* v. *Radio Corp. of Am.*, 183 F.2d 558, 560 (3d Cir. 1950); *Zachman* v. *Erwin*, 186 F.Supp. 681 (S.D.Tex. 1959); *Baim & Blank, Inc.* v. *Warren Connelly Co., Inc.*, 19 F.R.D. 108 (S.D.N.Y. 1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Subdivision (b)(1). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a)(2)(i) and (ii), and the Advisory Committee's Note thereto; Hazard, Indispensable Party; The Historical Origin of a Procedural Phantom, 61 Colum.L.Rev. 1254, 1259–60 (1961); cf. 3 Moore, supra, par. 23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways." Louisell & Hazard, Pleading and Procedure; State and Federal 719 (1962); see *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 366–67 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See *Maricopa County Mun. Water Con. Dist.* v. *Looney*, 219 F.2d 529 (9th Cir. 1955); *Rank* v. *Krug*, 142 F.Supp. 1, 154–59 (S.D.Calif. 1956), on app., *State of California* v. *Rank*, 293 F.2d 340, 348 (9th Cir. 1961); *Gart* v. *Cole*, 263 F.2d 244 (2d Cir. 1959), cert. denied 359 U.S. 978 (1959); cf. *Martinez* v. *Maverick Cty. Water Con. & Imp. Dist.*, 219 F.2d 666 (5th Cir. 1955); 3 Moore, supra, par. 23.11[2], at 3458–59.

Clause (B): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual actions would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921); *Waybright* v. *Columbian Mut. Life Ins. Co.*, 30 F.Supp. 885 (W.D.Tenn. 1939); cf. *Smith* v. *Swormstedt*, 16 How. (57 U.S.) 288 (1853). For much the same reason actions by shareholders to compel the declaration of a dividend the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. See *Knapp* v. *Bankers Securities Corp.*, 17 F.R.D. 245 (E.D.Pa. 1954), aff'd, 230 F.2d 717 (3d Cir. 1956); *Giesecke* v. *Denver Tramway Corp.*, 81 F.Supp. 957 (D.Del. 1949); *Zahn* v. *Transamerica Corp.*, 162 F.2d 36 (3d Cir. 1947); *Speed* v. *Transamerica Corp.*, 100 F.Supp. 461 (D.Del. 1951); *Sobel* v. *Whittier Corp.*, 95 F.Supp. 643 (E.D.Mich. 1951), app. dism., 195 F.2d 361 (6th Cir. 1952); *Goldberg* v. *Whittier Corp.*, 111 F.Supp. 382 (E.D.Mich. 1953); *Dann* v. *Studebaker-Packard Corp.*, 288 F.2d 201 (6th Cir. 1961); *Edgerton* v. *Armour & Co.*, 94 F.Supp. 549 (S.D.Calif. 1950); *Ames* v. *Mengel Co.*, 190 F.2d 344 (2d Cir. 1951). (These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1). The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. See *Bosenberg* v. *Chicago T. & T. Co.*, 128 F.2d 245 (7th Cir. 1942); *Citizens Banking Co.* v. *Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944); *Redmond* v. *Commerce Trust Co.*, 144 F.2d 140 (8th Cir. 1944), cert. denied, 323 U.S. 776 (1944); cf. *York* v. *Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. Cf. *Dickinson* v. *Burnham*, 197 F.2d 973 (2d Cir. 1952), cert. denied, 344 U.S. 875 (1952); 3 Moore, supra, at par. 23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See *Hefferman* v. *Bennett & Armour*, 110 Cal.App.2d 564, 243 P.2d 846 (1952); cf. *City & County of San Francisco* v. *Market Street Ry.*, 95 Cal.App.2d 648, 213 P.2d 780 (1950). Similar problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. Cf. *United States* v. *Paramount Pictures, Inc.*, 66 F.Supp. 323, 341–46 (S.D.N.Y. 1946); 334 U.S. 131, 144–48 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).)

Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief

when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See *Potts* v. *Flax*, 313 F.2d 284 (5th Cir. 1963); *Bailey* v. *Patterson*, 323 F.2d 201 (5th Cir. 1963), cert. denied, 377 U.S. 972 (1964); *Brunson* v. *Board of Trustees of School District No. 1, Clarendon City, S.C.*, 311 F.2d 107 (4th Cir. 1962), cert. denied, 373 U.S. 933 (1963); *Green* v. *School Bd. of Roanoke, Va.*, 304 F.2d 118 (4th Cir. 1962); *Orleans Parish School Bd.* v. *Bush*, 242 F.2d 156 (5th Cir. 1957), cert. denied, 354 U.S. 921 (1957); *Mannings* v. *Board of Public Inst. of Hillsborough County, Fla.*, 277 F.2d 370 (5th Cir. 1960); *Northcross* v. *Board of Ed. of City of Memphis*, 302 F.2d 818 (6th Cir. 1962), cert. denied 370 U.S. 944 (1962); *Frasier* v. *Board of Trustees of Univ. of N.C.*, 134 F.Supp. 589 (M.D.N.C. 1955, 3-judge court), aff'd, 350 U.S. 979 (1956). Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote, uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. Cf. Chafee, supra, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representation made or in the kinds or degrees of reliance by the persons to whom they were addressed. See *Oppenheimer* v. *F. J. Young & Co., Inc.*, 144 F.2d 387 (2d Cir. 1944); *Miller* v. *National City Bank of N.Y.*, 166 F.2d 723 (2d Cir. 1948); and for like problems in other contexts, see *Hughes* v. *Encyclopaedia Brittanica*, 199 F.2d 295 (7th Cir. 1952); *Sturgeon* v. *Great Lakes Steel Corp.*, 143 F.2d 819 (6th Cir. 1944). A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See *Pennsylvania R.R.* v. *United States*, 111 F.Supp. 80 (D.N.J. 1953); cf. Weinstein, supra, 9 Buffalo L.Rev. at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), pet. cert. dism., 371 U.S. 801 (1963); cf. *Weeks* v. *Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941); *Kainz* v. *Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952); *Hess* v. *Anderson, Clayton & Co.*, 20 F.R.D. 466 (S.D.Calif. 1957).

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, supra, 9 Buffalo L.Rev. at 438-54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is "superior" to the others in the particular circumstances.

Factors (A)-(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See *Weeks* v. *Bareco Oil Co.*, 125 F.2d 84, 88-90, 93-94 (7th Cir. 1941) (anti-trust action); see also *Pentland* v. *Dravo Corp.*, 152 F.2d 851 (3d Cir. 1945), and Chaffee, supra, at 273-75, regarding policy of Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C. § 216(b), prior to amendment by Portal-to-Portal Act of 1947, § 5(a). [The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended.]

In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c)(2) below, of the right of members to be excluded from the class upon their request.)

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Subdivision (c)(1). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each

case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d)(4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim "ancillary" jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d)(2).

Subdivision (c)(2) makes special provision for class actions maintained under subdivision (b)(3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort. (For further discussion of this notice, see the statement under subdivision (d)(2) below.)

Subdivision (c)(3). The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or (b)(2), those found by the court to be class members; in a class action under subdivision (b)(3), those to whom the notice prescribed by subdivision (c)(2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b)(1) or (b)(2) action the judgment "describes" the members of the class, but need not specify the individual members; in a (b)(3) action the judgment "specifies" the individual members who have been identified and described the others.

Compare subdivision (c)(4) as to actions conducted as class actions only with respect to particnlar issues. Where the class-action character of the lawsuit is based solely on the existence of a "limited fund," the judgment, while extending to all claims of class members against the fund, has ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, supra, par. 23.11[4].

Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening before the determination of liability, courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called "one-way" intervention in "spurious" actions, the conflicting views expressed in *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), pet. cert. dism., 371 U.S. 801 (1963); *York* v. *Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir. 1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945); *Pentland* v. *Dravo Corp.*, 152 F.2d 851, 856 (3d Cir. 1945); *Speed* v. *Transamerica Corp.*, 100 F.Supp. 461, 463 (D.Del. 1951); *State Wholesale Grocers* v. *Great Atl. & Pac. Tea Co.*, 24 F.R.D. 510 (N.D.Ill. 1959); *Alabama Ind. Serv. Stat. Assn.* v. *Shell Pet Corp.*, 28 F.Supp. 386, 390 (N.D.Ala. 1939); *Tolliver* v. *Cudahy Packing Co.*, 39 F.Supp. 337, 339 (E.D.Tenn. 1941); Kalven & Rosenfield, supra, 8 U. of Chi.L.Rev. 684 (1941); Comment, 53 Nw.U.L.Rev. 627, 632-33 (1958); Developments in the Law, supra, 71 Harv.L.Rev. at 935; 2 Barron & Holtzoff, supra, § 568; but cf. *Lockwood* v. *Hercules Powder Co.*, 7 F.R.D. 24, 28-29 (W.D.Mo. 1947); *Abram* v. *San Joaquin Cotton Oil Co.*, 46 F.Supp. 969, 976-77 (S.D.Calif. 1942); Chaffee, supra, at 280, 285; 3 Moore, supra, par. 23.12, at 3476. Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action. See Restatement, Judgments § 86, comment (h), § 116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of res judicata are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chafee, supra, at 294; Weinstein, supra, 9 Buffalo L.Rev. at 460.

Subdivision (c)(4). This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (d) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision (d)(1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d)(2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in "limited fund" cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see *United States* v. *American Optical Co.*, 97 F.Supp. 66 (N.D.Ill. 1951), and 1950-51 CCH Trade Cases 64573-74 (par. 62869); cf. *Weeks* v. *Bareco Oil Co.*, 125 F.2d 84, 94 (7th Cir. 1941), and notice may encourage interventions to improve the representation of the class. Cf. *Oppenheimer* v. *F. J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961).

Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there

is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry* v. *Lee*, 311 U.S. 32 (1940); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); cf. *Dickinson* v. *Burnham*, 197 F.2d 973, 979 (2d Cir. 1952), and studies cited at 979 n. 4; see also *All American Airways, Inc.* v. *Elderd*, 209 F.2d 247, 249 (2d Cir. 1954); *Gart* v. *Cole*, 263 F.2d 244, 248-49 (2d Cir. 1959), cert. denied, 359 U.S. 978 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process. See Chafee, supra, at 230-31; *Brendle* v. *Smith*, 7 F.R.D. 119 (S.D.N.Y. 1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally "for the protection of the members of the class or otherwise for the fair conduct of the action" and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in *Cherner* v. *Transitron Electronic Corp.*, 201 F.Supp. 934 (D.Mass. 1962); *Hormel* v. *United States*, 17 F.R.D. 303 (S.D.N.Y. 1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, e.g., on the strengthening of the representation, see subdivision (c)(1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.

CROSS REFERENCES

Capacity of unincorporated association to sue or be sued, see rule 17.

Process on corporations in stockholder's derivative action, see section 1695 of this title.

Venue in stockholder's derivative action, see section 1401 of this title.

Rule 23.1. Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

(Added Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

A derivative action by a shareholder of a corporation or by a member of an unincorporated association has distinctive aspects which require the special provisions set forth in the new rule. The next-to-the-last sentence recognizes that the question of adequacy of representation may arise when the plaintiff is one of a group of shareholders or members. Cf. 3 Moore's Federal Practice, par. 23.08 (2d ed. 1963).

The court has inherent power to provide for the conduct of the proceedings in a derivative action, including the power to determine the course of the proceedings and require that any appropriate notice be given to shareholders or members.

Rule 23.2. Actions Relating to Unincorporated Associations

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

(Added Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action, the real or main purpose of this characterization has been to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b). See Louisell & Hazard, Pleading and Procedure: State and Federal 718 (1962); 3 Moore's Federal Practice, par. 23.08 (2d ed. 1963); Story, J. in *West* v. *Randall*, 29 Fed.Cas. 718, 722-23, No. 17,424 (C.C.D.R.I. 1820); and, for examples, *Gibbs* v. *Buck*, 307 U.S. 66 (1939); *Tunstall* v. *Brotherhood of Locomotive F. & E.*, 148 F.2d 403 (4th Cir. 1945); *Oskoian* v. *Canuel*, 269 F.2d 311 (1st Cir. 1959). Rule 23.2 deals separately with these actions, referring where appropriate to Rule 23.

Rule 24. Intervention

(a) Intervention of right

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition

of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive intervention

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure

A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403.

(As amended Dec. 27, 1946; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

The right to intervene given by the following and similar statutes is preserved, but the procedure for its assertion is governed by this rule:

U.S.C., Title 28, former:

§ 45a (Special attorneys; participation by Interstate Commerce Commission; intervention) (in certain cases under interstate commerce laws)

§ 48 (Suits to be against United States; intervention by United States)

§ 401 (Intervention by United States; constitutionality of Federal statute)

U.S.C., Title 40:

§ 276a-2 (b) (Bonds of contractors for public buildings or works; rights of persons furnishing labor and materials).

Compare with the last sentence of former Equity Rule 37 (Parties Generally—Intervention). This rule amplifies and restates the present federal practice at law and in equity. For the practice in admiralty see Admiralty Rules 34 (How Third Party May Intervene) and 42 (Claims Against Proceeds in Registry). See generally Moore and Levi, Federal Intervention: I The Right to Intervene and Reorganization (1936), 45 Yale L.J. 565. Under the codes two types of intervention are provided, one for the recovery of specific real or personal property (2 Ohio Gen.Code Ann. (Page, 1926) § 11263; Wyo.Rev.Stat.Ann. (Courtright, 1931) § 89-522), and the other allowing intervention generally when the applicant has an interest in the matter in litigation (1 Colo.Stat.Ann. (1935) Code Civ.Proc. § 22; La.Code Pract. (Dart, 1932) Arts. 389-394; Utah Rev.Stat.Ann. (1933) § 104-3-24). The English intervention practice is based upon various rules and decisions and falls into the two categories of absolute right and discretionary right. For the absolute right see English Rules Under the Judicature Act (The Annual Practice, 1937) O. 12, r. 24 (admiralty), r. 25 (land), r. 23 (probate); O. 57, r. 12 (execution); J. A. (1925) §§ 181, 182, 183(2) (divorce); *In re Metropolitan Amalgamated Estates, Ltd.*, (1912) 2 Ch. 497 (receivership); *Wilson* v. *Church*, 9 Ch.D. 552 (1878) (representative action). For the discretionary right see O. 16, r. 11 (nonjoinder) and *Re Fowler*, 142 L. T. Jo. 94 (Ch. 1916), *Vavasseur* v. *Krupp*, 9 Ch.D. 351 (1878) (persons out of the jurisdiction).

NOTES OF ADVISORY COMMITTEE ON 1946 AND 1948 AMENDMENTS TO RULE

Note. Subdivision (a). The addition to subdivision (a)(3) covers the situation where property may be in the actual custody of some other officer or agency—such as the Secretary of the Treasury—but the control and disposition of the property is lodged in the court wherein the action is pending.

Subdivision (b). The addition in subdivision (b) permits the intervention of governmental officers or agencies in proper cases and thus avoids exclusionary constructions of the rule. For an example of the latter, see Matter of Bender Body Co., Ref.Ohio 1941, 47 F.Supp. 224, aff'd as moot, N.D.Ohio 1942, 47 F.Supp. 224, 234, holding that the Administrator of the Office of Price Administration, then acting under the authority of an Executive Order of the President, could not intervene in a bankruptcy proceeding to protest the sale of assets above ceiling prices. Compare, however, *Securities and Exchange Commission* v. *United States Realty & Improvement Co.*, 1940, 310 U.S. 434, 60 S.Ct. 1044, where permissive intervention of the Commission to protect the public interest in an arrangement proceeding under Chapter XI of the Bankruptcy Act was upheld. See also dissenting opinion in *Securities and Exchange Commission* v. *Long Island Lighting Co.*, C.C.A.2d, 1945, 148 F.2d 252, judgment vacated as moot and case remanded with direction to dismiss complaint, 1945, 325 U.S. 833, 65 S.Ct. 1085. For discussion see Commentary, Nature of Permissive Intervention Under Rule 24b, 1940, 3 Fed.Rules Serv. 704; Berger, Intervention by Public Agencies in Private Litigation in the Federal Courts, 1940, 50 Yale L.J. 65.

Regarding the construction of subdivision (b)(2), see *Allen Calculators, Inc.* v. *National Cash Register Co.*, 1944, 322 U.S. 137, 64 S. Ct. 905.

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

This amendment conforms to the amendment of Rule 5(a). See the Advisory Committee's Note to that amendment.

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

In attempting te overcome certain difficulties which have arisen in the application of present Rule 24(a)(2) and (3), this amendment draws upon the revision of the related Rules 19 (joinder of persons needed for just adjudication) and 23 (class actions), and the reasoning underlying that revision.

Rule 24(a)(3) as amended in 1948 provided for intervention of right where the applicant established that he would be adversely affected by the distribution or disposition of property involved in an action to which he had not been made a party. Significantly, some decided cases virtually disregarded the language of this provision. Thus Professor Moore states: "The concept of a fund has been applied so loosely that it is possible for a court to find a fund in almost any in personam action." 4 Moore's Federal Practice, par. 24.09[3], at 55 (2d ed. 1962), and see, e.g., *Formulabs, Inc.* v. *Hartley Pen Co.*, 275 F.2d 52 (9th Cir. 1960). This development was quite natural, for Rule 24(a)(3) was unduly re-

stricted. If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of. Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion. See Louisell & Hazard, Pleading and Procedure: State and Federal 749-50 (1962).

The general purpose of original Rule 24(a)(2) was to entitle an absentee, purportedly represented by a party, to intervene in the action if he could establish with fair probability that the representation was inadequate. Thus, where an action is being prosecuted or defended by a trustee, a beneficiary of the trust should have a right to intervene if he can show that the trustee's representation of his interest probably is inadequate; similarly a member of a class should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court.

Original Rule 24(a)(2), however, made it a condition of intervention that "the applicant is or may be bound by a judgment in the action," and this created difficulties with intervention in class actions. If the "bound" language was read literally in the sense of res judicata, it could defeat intervention in some meritorious cases. A member of a class to whom a judgment in a class action extended by its terms (see Rule 23(c)(3), as amended) might be entitled to show in a later action, when the judgment in the class action was claimed to operate as res judicata against him, that the "representative" in the class action had not in fact adequately represented him. If he could make this showing, the class-action judgment might be held not to bind him. See *Hansberry* v. *Lee*, 311 U.S. 32 (1940). If a class member sought to intervene in the class action proper, while it was still pending, on grounds of inadequacy of representation, he could be met with the argument: if the representation was in fact inadequate, he would not be "bound" by the judgment when it was subsequently asserted against him as res judicata, hence he was not entitled to intervene; if the representation was in fact adequate, there was no occasion or ground for intervention. See *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961); cf. *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19 (1951). This reasoning might be linguistically justified by original Rule 24(a)(2); but it could lead to poor results. Compare the discussion in *International M. & I. Corp.* v. *Von Clemm*, 301 F.2d 857 (2d Cir. 1962); *Atlantic Refining Co.* v. *Standard Oil Co.*, 304 F.2d 387 (D.C.Cir. 1962). A class member who claims that his "representative" does not adequately represent him, and is able to establish that proposition with sufficient probability, should not be put to the risk of having a judgment entered in the action which by its terms extends to him, and be obliged to test the validity of the judgment as applied to his interest by a later collateral attack. Rather he should, as a general rule, be entitled to intervene in the action.

The amendment provides that an applicant is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i), as amended, unless his interest is already adequately represented in the action by existing parties. The Rule 19(a)(2)(i) criterion imports practical considerations, and the deletion of the "bound" language similarly frees the rule from undue preoccupation with strict considerations of res judicata.

The representation whose adequacy comes into question under the amended rule is not confined to formal representation like that provided by a trustee for his beneficiary or a representative party in a class action for a member of the class. A party to an action may provide practical representation to the absentee seeking intervention although no such formal relationship exists between them, and the adequacy of this practical representation will then have to be weighed. See *International M. & I. Corp.* v. *Von Clemm*, and *Atlantic Refining Co.* v. *Standard Oil Co.*, both supra; *Wolpe* v. *Poretsky*, 144 F.2d 505 (D.C.Cir. 1944), cert. denied, 323 U.S. 777 (1944); cf. *Ford Motor Co.* v. *Bisanz Bros.*, 249 F.2d 22 (8th Cir. 1957); and generally, Annot., 84 A.L.R.2d 1412 (1961).

An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.

CROSS REFERENCES

Intervention of—

Parties interested in action to enforce, suspend or annul orders of the Interstate Commerce Commission, see section 2323 of this title.

United States where constitutionality of federal statute is questioned, see section 2403 of this title.

FORMS

Motion to intervene as defendant, see form 23, Appendix of Forms.

Rule 25. Substitution of Parties

(a) Death

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) Incompetency

If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) Transfer of interest

In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) Public officers; death or separation from office

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a

party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 17, 1961, eff. July 19, 1961; Jan. 21, 1963, July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). 1. The first paragraph of this rule is based upon former Equity Rule 45 (Death of Party—Revivor) and U.S.C., Title 28, former § 778 (Death of parties; substitution of executor or administrator). The *scire facias* procedure provided for in the statute cited is superseded and the writ is abolished by Rule 81 (b). Paragraph two states the content of U.S.C., Title 28, former § 779 (Death of one of several plaintiffs or defendants). With these two paragraphs compare generally English Rules Under the Judicature Act (The Annual Practice, 1937) O. 17, r.r. 1-10.

2. This rule modifies U.S.C., Title 28, former §§ 778 (Death of parties; substitution of executor or administrator), 779 (Death of one of several plaintiffs or defendants), and 780 (Survival of actions, suits, or proceedings, etc.) insofar as they differ from it.

Note to Subdivisions (b) and (c). These are a combination and adaptation of N.Y.C.P.A. (1937) § 83 and Calif.Code Civ.Proc. (Deering, 1937) § 385; see also 4 Nev.Comp.Laws (Hillyer, 1929) § 8561.

Note to Subdivision (d). With the first and last sentences compare U.S.C., Title 28, former § 780 (Survival of actions, suits, or proceedings, etc.). With the second sentence of this subdivision compare *Ex parte La Prade,* 289 U.S. 444, 53 S.Ct. 682, 77 L.Ed. 1311 (1933).

AMENDMENTS

1948—The amendment effective October 19, 1949, inserted the words, "the Canal Zone, a territory, an insular possession," in the first sentence of subdivision (d), and, in the same sentence, after the phrase "or other governmental agency," deleted the words, "or any other officer specified in the act of February 13, 1925, ch. 229, § 11 (43 Stat. 941), formerly section 780 of this title".

NOTES OF ADVISORY COMMITTEE ON 1961 AMENDMENT TO RULES

Subdivision (d)(1). Present Rule 25(d) is generally considered to be unsatisfactory. 4 Moore's, Federal Practice ¶ 25.01[7] (2d ed. 1950; Wright, Amendments to the Federal Rules: The Function of a Continuing Rules Committee, 7 Vand.L.Rev. 521, 529 (1954); Developments in the Law—Remedies Against the United States and Its Officials, 70 Harv.L.Rev. 827, 931-34 (1957). To require, as a condition of substituting a successor public officer as a party to a pending action, that an application be made with a showing that there is substantial need for continuing the litigation, can rarely serve any useful purpose and fosters a burdensome formality. And to prescribe a short, fixed time period for substitution which cannot be extended even by agreement, see *Snyder* v. *Buck,* 340 U.S. 15, 19 (1950), with the penalty of dismissal of the action, "makes a trap for unsuspecting litigants which seems unworthy of a great government." *Vibra Brush Corp.* v. *Schaffer,* 256 F.2d 681, 684 (2d Cir. 1958). Although courts have on occasion found means of undercutting the rule, e.g. *Acheson* v. *Furusho,* 212 F.2d 284 (9th Cir. 1954) (substitution of defendant officer unnecessary on theory that only a declaration of status was sought), it has operated harshly in many instances, e.g. *Snyder* v. *Buck,* supra; *Poindexter* v. *Folsom,* 242 F.2d 516 (3d Cir. 1957).

Under the amendment, the successor is automatically substituted as a party without an application or showing of need to continue the action. An order of substitution is not required, but may be entered at any time if a party desires or the court thinks fit.

The general term "public officer" is used in preference to the enumeration which appears in the present rule. It comprises Federal, State, and local officers.

The expression "in his official capacity" is to be interpreted in its context as part of a simple procedural rule for substitution; care should be taken not to distort its meaning by mistaken analogies to the doctrine of sovereign immunity from suit or the Eleventh Amendment. The amended rule will apply to all actions brought by public officers for the government, and to any action brought in form against a named officer, but intrinsically against the government or the office or the incumbent thereof whoever he may be from time to time during the action. Thus the amended rule will apply to actions against officers to compel performance of official duties or to obtain judicial review of their orders. It will also apply to actions to prevent officers from acting in excess of their authority or under authority not validly conferred, cf. *Philadelphia Co.* v. *Stimson,* 223 U.S. 605 (1912), or from enforcing unconstitutional enactments, cf. *Ex parte Young,* 209 U.S. 123 (1908); *Ex parte La Prade,* 289 U.S. 444 (1933). In general it will apply whenever effective relief would call for corrective behavior by the one then having official status and power, rather than one who has lost that status and power through ceasing to hold office. Cf. *Land* v. *Dollar,* 330 U.S. 731 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682 (1949). Excluded from the operation of the amended rule will be the relatively infrequent actions which are directed to securing money judgments against the named officers enforceable against their personal assets; in these cases Rule 25(a)(1), not Rule 25(d), applies to the question of substitution. Examples are actions against officers seeking to make them pay damages out of their own pockets for defamatory utterances or other misconduct in some way related to the office, see *Barr* v. *Matteo,* 360 U.S. 564 (1959); *Howard* v. *Lyons,* 360 U.S. 593 (1959); *Gregoire* v. *Biddle,* 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950). Another example is the anomalous action for a tax refund against a collector of internal revenue, see *Ignelzi* v. *Granger,* 16 F.R.D. 517 (W.D.Pa. 1955), 28 U.S.C. § 2006, 4 Moore, supra, ¶ 25.05, p. 531; but see 28 U.S.C. § 1346(a)(1), authorizing the bringing of such suits against the United States rather than the officer.

Automatic substitution under the amended rule, being merely a procedural device for substituting a successor for a past officeholder as a party, is distinct from and does not affect any substantive issues which may be involved in the action. Thus a defense of immunity from suit will remain in the case despite a substitution.

Where the successor does not intend to pursue the policy of his predecessor which gave rise to the lawsuit, it will be open to him, after substitution, as plaintiff to seek voluntary dismissal of the action, or as defendant to seek to have the action dismissed as moot or to take other appropriate steps to avert a judgment or decree. Contrast *Ex parte La Prade,* supra; *Allen* v. *Regents of the University System,* 304 U.S. 439 (1938); *McGrath* v. *National Assn. of Mfgrs.,* 344 U.S. 804 (1952); *Danenberg.* v. *Cohen,* 213 F.2d 944 (7th Cir. 1954).

As the present amendment of Rule 25(d)(1) eliminates a specified time period to secure substitution of public officers, the reference in Rule 6(b) (regarding enlargement of time) to Rule 25 will no longer apply to these public-officer substitutions.

As to substitution on appeal, the rules of the appellate courts should be consulted.

Subdivision (d)(2). This provision, applicable in "official capacity" cases as described above, will encour-

age the use of the official title without any mention of the officer individually, thereby recognizing the intrinsic character of the action and helping to eliminate concern with the problem of substitution. If for any reason it seems desirable to add the individual's name, this may be done upon motion or on the court's initiative; thereafter the procedure of amended Rule 25(d)(1) will apply if the individual named ceases to hold office.

For examples of naming the office or title rather than the officeholder, see *Annot.*, 102 A.L.R. 943, 948-52; *Comment*, 50 Mich.L.Rev. 443, 450 (1952); cf. 26 U.S.C. § 7484. Where an action is brought by or against a board or agency with continuity of existence, it has been often decided that there is no need to name the individual members and substitution is unnecessary when the personnel changes. 4 Moore, supra, ¶ 25.09, p. 536. The practice encouraged by amended Rule 25(d)(2) is similar.

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

Present Rule 25(a)(1), together with present Rule 6(b), results in an inflexible requirement that an action be dismissed as to a deceased party if substitution is not carried out within a fixed period measured from the time of the death. The hardships and inequities of this unyielding requirement plainly appear from the cases. See e.g., *Anderson* v. *Yungkau*, 329 U.S. 482, 67 S.Ct. 428, 91 L.Ed. 436 (1947); *Iovino* v. *Waterson*, 274 F.2d 41 (1959), cert. denied, *Carlin* v. *Sovino*, 362 U.S. 949, 80 S.Ct. 860, 4 L.Ed.2d 867 (1960); *Perry* v. *Allen*, 239 F.2d 107 (5th Cir. 1956); *Starnes* v. *Pennsylvania R.R.*, 26 F.R.D. 625 (E.D.N.Y.), aff'd per curiam, 295 F.2d 704 (2d Cir. 1961), cert. denied, 369 U.S. 813, 82 S.Ct. 688, 7 L.Ed.2d 612 (1962); *Zdanok* v. *Glidden Co.*, 28 F.R.D. 346 (S.D.N.Y. 1961). See also 4 Moore's Federal Practice ¶ 25.01[9] (Supp. 1960); 2 Barron & Holtzoff, Federal Practice & Procedure § 621, at 420-21 (Wright ed. 1961).

The amended rule establishes a time limit for the motion to substitute based not upon the time of the death, but rather upon the time information of the death as provided by the means of a suggestion of death upon the record, i.e., service of a statement of the fact of the death. Cf. Ill.Ann.Stat., ch. 110, § 54(2) (Smith-Hurd 1956). The motion may not be made later than 90 days after the service of the statement unless the period is extended pursuant to Rule 6(b), as amended. See the Advisory Committee's Note to amended Rule 6(b). See also the new Official Form 30.

A motion to substitute may be made by any party or by the representative of the deceased party without awaiting the suggestion of death. Indeed, the motion will usually be so made. If a party or the representative of the deceased party desires to limit the time within which another may make the motion, he may do so by suggesting the death upon the record.

A motion to substitute made within the prescribed time will ordinarily be granted, but under the permissive language of the first sentence of the amended rule ("the court may order") it may be denied by the court in the exercise of a sound discretion if made long after the death—as can occur if the suggestion of death is not made or is delayed—and circumstances have arisen rendering it unfair to allow substitution. Cf. *Anderson* v. *Yungkau*, supra, 329 U.S. at 485, 486, 67 S.Ct. at 430, 431, 91 L.Ed. 436, where it was noted under the present rule that settlement and distribution of the state of a deceased defendant might be so far advanced as to warrant denial of a motion for substitution even though made within the time limit prescribed by that rule. Accordingly, a party interested in securing substitution under the amended rule should not assume that he can rest indefinitely awaiting the suggestion of death before he makes his motion to substitute.

CROSS REFERENCES

Depositions, right to use after substitution, see rule 26.

Extension of time for substitution, prohibiting, see rule 6.

TITLE V—DEPOSITIONS AND DISCOVERY

ADVISORY COMMITTEE'S EXPLANATORY STATEMENT CONCERNING 1970 AMENDMENTS OF THE DISCOVERY RULES

This statement is intended to serve as a general introduction to the amendments of Rules 26-37, concerning discovery, as well as related amendments of other rules. A separate note of customary scope is appended to amendments proposed for each rule. This statement provides a framework for the consideration of individual rule changes.

Changes in the Discovery Rules

The discovery rules, as adopted in 1938, were a striking and imaginative departure from tradition. It was expected from the outset that they would be important, but experience has shown them to play an even larger role than was initially foreseen. Although the discovery rules have been amended since 1938, the changes were relatively few and narrowly focused, made in order to remedy specific defects. The amendments now proposed reflect the first comprehensive review of the discovery rules undertaken since 1938. These amendments make substantial changes in the discovery rules. Those summarized here are among the more important changes.

Scope of Discovery. New provisions are made and existing provisions changed affecting the scope of discovery: (1) The contents of insurance policies are made discoverable (Rule 26(b)(2)). (2) A showing of good cause is no longer required for discovery of documents and things and entry upon land (Rule 34). However, a showing of need is required for discovery of "trial preparation" materials other than a party's discovery of his own statement and a witness' discovery of his own statement; and protection is afforded against disclosure in such documents of mental impressions, conclusions, opinions, or legal theories concerning the litigation. (Rule 26(b)(3)). (3) Provision is made for discovery with respect to experts retained for trial preparation, and particularly those experts who will be called to testify at trial (Rule 26(b)(4)). (4) It is provided that interrogatories and requests for admission are not objectionable simply because they relate to matters of opinion or contention, subject of course to the supervisory power of the court (Rules 33(b), 36(a)). (5) Medical examination is made available as to certain nonparties. (Rule 35(a)).

Mechanics of Discovery. A variety of changes are made in the mechanics of the discovery process, affecting the sequence and timing of discovery, the respective obligations of the parties with respect to requests, responses, and motions for court orders, and the related powers of the court to enforce discovery requests and to protect against their abusive use. A new provision eliminates the automatic grant of priority in discovery to one side (Rule 26(d)). Another provides that a party is not under a duty to supplement his responses to requests for discovery, except as specified (Rule 26(e)).

Other changes in the mechanics of discovery are designed to encourage extrajudicial discovery with a minimum of court intervention. Among these are the following: (1) The requirement that a plaintiff seek leave of court for early discovery requests is eliminated or reduced, and motions for a court order under Rule 34 are made unnecessary. Motions under Rule 35 are continued. (2) Answers and objections are to be served together and an enlargement of the time for response is provided. (3) The party seeking discovery, rather than the objecting party, is made responsible for invoking judicial determination of discovery disputes not resolved by the parties. (4) Judicial sanctions are tightened with respect to unjustified insistence upon or objection to discovery. These changes bring Rules 33, 34, and 36 substantially into line with the procedure now provided for depositions.

Failure to amend Rule 35 in the same way is based upon two considerations. First, the Columbia Survey (described below) finds that only about 5 percent of medical examinations require court motions, of which about half result in court orders. Second and of greater importance, the interest of the person to be examined in the privacy of his person was recently stressed by the Supreme Court in *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964). The court emphasized the trial judge's responsibility to assure that the medical examination was justified, particularly as to its scope.

Rearrangement of Rules. A limited rearrangement of the discovery rules has been made, whereby certain provisions are transferred from one rule to another. The reasons for this rearrangement are discussed below in a separate section of this statement, and the details are set out in a table at the end of this statement.

Optional Procedures. In two instances, new optional procedures have been made available. A new procedure is provided to a party seeking to take the deposition of a corporation or other organization (Rule 30(b)(6)). A party on whom interrogatories have been served requesting information derivable from his business records may under specified circumstances produce the records rather than give answers (Rule 33(c)).

Other Changes. This summary of changes is by no means exhaustive. Various changes have been made in order to improve, tighten, or clarify particular provisions, to resolve conflicts in the case law, and to improve language. All changes, whether mentioned here or not, are discussed in the appropriate note for each rule.

A Field Survey of Discovery Practice

Despite widespread acceptance of discovery as an essential part of litigation, disputes have inevitably arisen concerning the values claimed for discovery and abuses alleged to exist. Many disputes about discovery relate to particular rule provisions or court decisions and can be studied in traditional fashion with a view to specific amendment. Since discovery is in large measure extra-judicial, however, even these disputes may be enlightened by a study of discovery "in the field." And some of the larger questions concerning discovery can be pursued only by a study of its operation at the law office level and in unreported cases.

The Committee, therefore, invited the Project for Effective Justice of Columbia Law School to conduct a field survey of discovery. Funds were obtained from the Ford Foundation and the Walter E. Meyer Research Institute of Law, Inc. The survey was carried on under the direction of Prof. Maurice Rosenberg of Columbia Law School. The Project for Effective Justice has submitted a report to the Committee entitled "Field Survey of Federal Pretrial Discovery" (hereafter referred to as the Columbia Survey). The Committee is deeply grateful for the benefit of this extensive undertaking and is most appreciative of the cooperation of the Project and the funding organizations. The Committee is particularly grateful to Professor Rosenberg who not only directed the survey but has given much time in order to assist the Committee in assessing the results.

The Columbia Survey concludes, in general, that there is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules. No widespread or profound failings are disclosed in the scope or availability of discovery. The costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement. On the other hand, no positive evidence is found that discovery promotes settlement.

More specific findings of the Columbia Survey are described in other Committee notes, in relation to particular rule provisions and amendments. Those interested in more detailed information may obtain it from the Project for Effective Justice.

Rearrangement of the Discovery Rules

The present discovery rules are structured entirely in terms of individual discovery devices, except for Rule 27 which deals with perpetuation of testimony, and Rule 37 which provides sanctions to enforce discovery. Thus, Rules 26 and 28 to 32 are in terms addressed only to the taking of a deposition of a party or third person. Rules 33 to 36 then deal in succession with four additional discovery devices: Written interrogatories to parties, production for inspection of documents and things, physical or mental examination and requests for admission.

Under the rules as promulgated in 1938, therefore, each of the discovery devices was separate and seifcontained. A defect of this arrangement is that there is no natural location in the discovery rules for provisions generally applicable to all discovery or to several discovery devices. From 1938 until the present, a few amendments have applied a discovery provision to several rules. For example, in 1948, the scope of deposition discovery in Rule 26(b) and the provision for protective orders in Rule 30(b) were incorporated by reference in Rules 33 and 34. The arrangement was adequate so long as there were few provisions governing discovery generally and these provisions were relatively simple.

As will be seen, however, a series of amendments are now proposed which govern most or all of the discovery devices. Proposals of a similar nature will probably be made in the future. Under these circumstances, it is very desirable, even necessary, that the discovery rules contain one rule addressing itself to discovery generally.

Rule 26 is obviously the most appropriate rule for this purpose. One of its subdivisions, Rule 26(b), in terms governs only scope of deposition discovery, but it has been expressly incorporated by reference in Rules 33 and 34 and is treated by courts as setting a general standard. By means of a transfer to Rule 26 of the provisions for protective orders now contained in Rule 30(b), and a transfer from Rule 26 of provisions addressed exclusively to depositions, Rule 26 is converted into a rule concerned with discovery generally. It becomes a convenient vehicle for the inclusion of new provisions dealing with the scope, timing, and regulation of discovery. Few additional transfers are needed. See table showing rearrangement of rules, set out below.

There are, to be sure, disadvantages in transferring any provision from one rule to another. Familiarity with the present pattern, reinforced by the references made by prior court decisions and the various secondary writings about the rules, is not lightly to be sacrificed. Revision of treatieses and other references works is burdensome and costly. Moreover, many States have adopted the existing pattern as a model for their rules.

On the other hand, the amendments now proposed will in any event require revision of texts and reference works as weil as reconsideration by States following the Federal model. If these amendments are to be incorporated in an understandable way, a rule with general discovery provisions is needed. As will be seen, the proposed rearrangement produces a more coherent and intelligible pattern for the discovery rules taken as a whole. The difficulties described are those encountered whenever statutes are reexamined and revised. Failure to rearrange the discovery rules now would freeze the present scheme, making future change even more difficult.

Table Showing Rearrangement of Rules

Existing Rule No.	*New Rule No.*
26(a)	30(a), 31(a)
26(c)	30(c)
26(d)	32(a)

Existing Rule No.	*New Rule No.*
26(e)	32(b)
26(f)	32(c)
30(a)	30(b)
30(b)	26(c)
32	32(d)

Rule 26. General Provisions Governing Discovery

(a) Discovery methods

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of discovery

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Insurance agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial preparation: materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial preparation: experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) Productive orders

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, op-

pression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and timing of discovery

Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of responses

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 30, 1970, eff. July 1, 1970.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). This rule freely authorizes the taking of depositions under the same circumstances and by the same methods whether for the purpose of discovery or for the purpose of obtaining evidence. Many states have adopted this practice on account of its simplicity and effectiveness, safeguarding it by imposing such restrictions upon the subsequent use of the deposition at the trial or hearing as are deemed advisable. See Ark.Civ.Code (Crawford, 1934) §§ 606-607; Calif.Code Civ.Proc. (Deering, 1937) § 2021; 1 Colo.Stat.Ann. (1935) Code Civ.Proc. § 376; Idaho Code Ann. (1932) § 16-906; Ill. Rules of Pract., Rule 19 (Ill.Rev.Stat. (1937) ch. 110, § 259.19); Ill.Rev.Stat. (1937) ch. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) §§ 2-1501, 2-1506; Ky.Codes (Carroll, 1932) Civ.Pract. § 557; 1 Mo.Rev.Stat. (1929) § 1753; 4 Mont.Rev.Codes Ann. (1935) § 10645; Neb.Comp.Stat. (1929) ch. 20, §§ 1246-7; 4 Nev.Comp.Laws (Hillyer, 1929) § 9001; 2 N.H.Pub.Laws (1926) ch. 337, § 1; N.C.Code Ann. (1935) § 1809; 2 N.D.Comp.Laws Ann. (1913) §§ 7889-7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525-6; 1 Ore.Code Ann. (1930) Title 9, § 1503; 1 S.D.Comp.Laws (1929) §§ 2713-16; Tex.Stat. (Vernon, 1928) arts. 3738, 3752, 3769; Utah Rev.Stat.Ann. (1933) § 104-51-7; Wash. Rules of Practice adopted by the Supreme Ct., Rule 8, 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308-8; W.Va.Code (1931) ch. 57, art. 4, § 1. Compare Equity Rules 47 (Depositions—To be Taken in Exceptional Instances); 54 (Depositions Under Revised Statutes, Sections 863, 865, 866, 867—Cross-Examination); 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness).

This and subsequent rules incorporate, modify, and broaden the provisions for depositions under U.S.C., Title 28, former §§ 639 (Depositions *de bene esse;* when and where taken; notice), 640 (Same; mode of taking), 641 (Same; transmission to court), 644 (Depositions under *dedimus potestatem* and *in perpetuam*), 646 (Deposition under *dedimus potestatem;* how taken). These statutes are superseded insofar as they differ from this and subsequent rules. U.S.C., Title 28, former § 643 (Depositions; taken in mode prescribed by State laws) is superseded by the third sentence of Subdivision (a).

While a number of states permit discovery only from parties or their agents, others either make no distinction between parties or agents of parties and ordinary witnesses, or authorize the taking of ordinary depositions, without restriction, from any persons who have knowledge of relevant facts. See Ark.Civ.Code (Crawford, 1934) §§ 606-607; 1 Idaho Code Ann. (1932) § 16-906; Ill. Rules of Pract., Rule 19 (Ill.Rev.Stat. (1937) ch. 110, § 259.19); Ill.Rev.Stat. (1937) ch. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) § 2-1501; Ky.Codes (Carroll, 1932) Civ.Pract. §§ 554-558; 2 Md.Ann.Code (Bagby, 1924) Art. 35, § 21; 2 Minn.Stat. (Mason, 1927) § 9820; 1 Mo.Rev.Stat. (1929) §§ 1753, 1759; Neb.Comp.Stat. (1929) ch. 20, §§ 1246-7; 2 N.H.Pub.Laws (1926) ch. 337, § 1; 2 N.D.Comp.Laws Ann. (1913) § 7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525-6; 1 S.D.Comp.Laws (1929) §§ 2713-16; Tex.Stat. (Vernon, 1928) arts. 3738, 3752, 3769; Utah Rev.Stat.Ann. (1933) § 104-51-7; Wash. Rules of Practice adopted by Supreme Ct., Rule 8, 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308-8; W.Va.Code (1931) ch. 57, art. 4, § 1.

The more common practice in the United States is to take depositions on notice by the party desiring them, without any order from the court, and this has been followed in these rules. See Calif.Code Civ.Proc. (Deering 1937) § 2031; 2 Fla.Comp.Gen.Laws Ann. (1927) §§ 4405-7; 1 Idaho Code Ann. (1932) § 16-902; Ill. Rules of Pract., Rule 19 (Ill.Rev.Stat. (1937) ch. 110, § 25919); Ill.Rev.Stat. (1937) ch. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) § 2-1502; Kan.Gen.Stat.Ann. (1935) § 60-2827; Ky.Codes (Carroll, 1932) Civ.Pract. § 565; 2 Minn.Stat. (Mason, 1927) § 9820; 1 Mo.Rev.Stat. (1929) § 1761; 4 Mont.Rev.Codes Ann. (1935) § 10651; Nev.Comp.Laws (Hillyer, 1929) § 9002; N.C.Code Ann. (1935) § 1809; 2

N.D.Comp.Laws Ann. (1913) § 7895; Utah Rev.Stat.Ann. (1933) § 104-51-8.

Note to Subdivision (b). While the old chancery practice limited discovery to facts supporting the case of the party seeking it, this limitation has been largely abandoned by modern legislation. See Ala.Code Ann. (Michie, 1928) §§ 7764-7773; 2 Ind.Stat.Ann. (Burns, 1933) §§ 2-1028, 2-1506, 2-1728-2-1732; Iowa Code (1935) § 11185; Ky.Codes (Carroll, 1932) Civ.Pract. §§ 557, 606 (8); La.Code Pract. (Dart, 1932) arts. 347-356; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, §§ 61-67; 1 Mo.Rev.Stat. (1929) §§ 1753, 1759; Neb.Comp.Stat. (1929) §§ 20-1246, 20-1247; 2 N.H.Pub.Laws (1926) ch. 337, § 1; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11497, 11526; Tex.Stat. (Vernon, 1928) arts. 3738, 3753, 3769; Wis.Stat. (1935) § 326.12; Ontario Consol.Rules of Pract. (1928) Rules 237-347; Quebec Code of Civ.Proc. (Curran, 1922) §§ 286-290.

Note to Subdivisions (d), (e), and (f). The restrictions here placed upon the use of depositions at the trial or hearing are substantially the same as those provided in U.S.C., Title 28, former § 641, for depositions taken, *de bene esse*, with the additional provision that any deposition may be used when the court finds the existence of exceptional circumstances. Compare English Rules Under the Judicature Act (The Annual Practice, 1937) O. 37, r. 18 (with additional provision permitting use of deposition by consent of the parties). See also former Equity Rule 64 (Former Depositions, Etc., May be Used Before Master); and 2 Minn. Stat. (Mason, 1927) § 9835 (Use in a subsequent action of a deposition filed in a previously dismissed action between the same parties and involving the same subject matter).

Notes of Advisory Committee on 1946 Amendment to Rules

Note. Subdivision (a). The amendment eliminates the requirement of leave of court for the taking of a deposition except where a plaintiff seeks to take a deposition within 20 days after the commencement of the action. The retention of the requirement where a deposition is sought by a plaintiff within 20 days of the commencement of the action protects a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit; the plaintiff, of course, needs no such protection. The present rule forbids the plaintiff to take a deposition, without leave of court, before the answer is served. Sometimes the defendant delays the serving of an answer for more than 20 days, but as 20 days are sufficient time for him to obtain a lawyer, there is no reason to forbid the plaintiff to take a deposition without leave merely because the answer has not been served. In all cases, Rule 30(a) empowers the court, for cause shown, to alter the time of the taking of a deposition, and Rule 30(b) contains provisions giving ample protection to persons who are unreasonably pressed. The modified practice here adopted is along the line of that followed in various states. See, e.g., 8 Mo.Rev.Stat.Ann., 1939, § 1917; 2 Burns' Ind.Stat.Ann., 1933, § 2-1506.

Subdivision (b). The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. *Engl* v. *Aetna Life Ins. Co.*, C.C.A.2d, 1943, 139 F.2d 469; *Mahler* v. *Pennsylvania R. Co.*, E.D.N.Y. 1945, 8 Fed.Rules Serv. 33,351, Case 1. In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible. *Lewis* v. *United Air Lines Transportation Corp.*, D.Conn. 1939, 27 F.Supp. 946; *Engl* v. *Aetna Life Ins. Co.*, supra; *Mahler* v. *Pennsylvania R. Co.*, supra; *Bloomer* v. *Sirian Lamp Co.*, D.Del. 1944, 8 Fed.Rules Serv. 26b.31, Case 3; *Rousseau* v. *Langley*, S.D.N.Y. 1945, 9 Fed.Rules Serv. 34.41, Case 1 (Rule 26 contemplates "examinations not merely for the narrow purpose of adducing testimony which may be offered in evidence but also for the broad discovery of information which may be useful in preparation for trial."); *Olson Transportation Co.* v. *Socony-Vacuum Co.*, E.D.Wis. 1944, 8 Fed.Rules Serv. 34.41, Case 2 (". . . the Rules . . . permit 'fishing' for evidence as they should."); Note, 1945, 45 Col.L.Rev. 482. Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved. Under Rule 26 (b) several cases, however, have erroneously limited discovery on the basis of admissibility, holding that the word "relevant" in effect meant "material and competent under the rules of evidence". *Poppino* v. *Jones Store Co.*, W.D.Mo. 1940, 1 F.R.D. 215, 3 Fed.Rules Serv. 26b.5, Case 1; *Benevento* v. *A. & P. Food Stores, Inc.*, E.D.N.Y. 1939, 26 F.Supp. 424. Thus it has been said that inquiry might not be made into statements or other matters which, when disclosed, amounted only to hearsay. See *Maryland for use of Montvila* v. *Pan-American Bus Lines, Inc.*, D.Md. 1940, 1 F.R.D. 213, 3 Fed.Rules Serv. 26b.211, Case 3; *Gitto* v. *"Italia," Societa Anonima Di Navigazione*, E.D.N.Y. 1940, 31 F.Supp. 567; *Rose Silk Mills, Inc.* v. *Insurance Co. of North America*, S.D.N.Y. 1939, 29 F.Supp. 504; *Colpak* v. *Hetterick*, E.D.N.Y. 1941, 40 F.Supp. 350; *Matthies* v. *Peter F. Connolly Co.*, E.D.N.Y. 1941, 6 Fed.Rules Serv. 30a.22, Case 1, 2 F.R.D. 277; *Matter of Examination of Citizens Casualty Co. of New York* S.D.N.Y. 1942, 3 F.R.D. 171, 7 Fed.Rules Serv. 26b.211, Case 1; *United States* v. *Silliman*, D.C.N.J. 1944 8 Fed.Rules Serv. 26b.52, Case 1. The contrary and better view, however, has often been stated. See e.g., *Engl* v. *Aetna Life Ins. Co.*, supra; *Stevenson* v. *Melady*, S.D.N.Y. 1940, 3 Fed.Rules Serv. 26b.31, Case 1, 1 F.R.D. 329; *Lewis* v. *United Air Lines Transport Corp.*, supra; *Application of Zenith Radio Corp.*, E.D.Pa. 1941, 4 Fed.Rules Serv. 30b. 21, Case 1, 1 F.R.D. 627; *Steingut* v. *Guaranty Trust Co. of New York*, S.D.N.Y. 1941, 1 F.R.D. 723, 4 Fed.Rules Serv. 26b.5. Case 2: *DeSeversky* v. *Republic Aviation Corp*, E.D.N.Y. 1941, 2 F.R.D. 183, 5 Fed.Rules Serv. 26b.31, Case 5; *Moore* v. *George A. Hormel & Co.*, S.D.N.Y. 1942, 6 Fed.Rules Serv. 30b.41, Case 1, 2 F.R.D. 340; *Hercules Powder Co.* v. *Rohm & Haas Co.*, D.Del. 1943, 7 Fed.Rules Serv. 45b.311, Case 2, 3 F.R.D. 302; *Bloomer* v. *Sirian Lamp Co.*, supra; *Crosby Steam Gage & Valve Co.* v. *Manning, Maxwell & Moore, Inc.*, D.Mass. 1944, 8 Fed.Rules Serv. 26b.31, Case 1; *Patterson Oil Terminals, Inc.* v. *Charles Kurz & Co., Inc.*, E.D.Pa. 1945, 9 Fed.Rules Serv. 33.321, Case 2; *Pueblo Trading Co.* v. *Reclamation Dist. No. 1500*, N.D.Cal. 1945, 9 Fed.Rules Serv. 33.321, Case 4, 4 F.R.D. 471. See also discussion as to the broad scope of discovery in *Hoffman* v. *Palmer*, C.C.A.2d, 1942, 129 F.2d 976, 995-997, aff'd on other grounds, 1942, 318 U.S. 109, 63 S.Ct. 477; Note, 1945, 45 Col.L.Rev. 482.

Notes of Advisory Committee on 1963 Amendment to Rules

This amendment conforms to the amendment of Rule 28(b). See the next-to-last paragraph of the Advisory Committee's Note to that amendment.

Notes of Advisory Committee on 1966 Amendment to Rules

The requirement that the plaintiff obtain leave of court in order to serve notice of taking of a deposition within 20 days after commencement of the action gives rises to difficulties when the prospective deponent is about to become unavailable for examination. The problem is not confined to admiralty, but has been of special concern in that context because of the mobility of vessels and their personnel. When Rule 26 was adopted as Admiralty Rule 30A in 1961, the prob-

lem was alleviated by permitting depositions *de bene esse*, for which leave of court is not required. See Advisory Committee's Note to Admiralty Rule 30A (1961).

A continuing study is being made in the effort to devise a modification of the 20-day rule appropriate to both the civil and admiralty practice to the end that Rule 26(a) shall state a uniform rule applicable alike te what are now civil actions and suits in admiralty. Meanwhlle, the exigencies of maritime litigation require preservation, for the time being at least, of the traditional de bene esse procedure for the post-unification counterpart of the present suit in admiralty. Accordingly, the amendment provides for continued avallability of that procedure in admiralty and maritime claims within the meaning of Rule 9(h).

NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

A limited rearrangement of the discovery rules is made, whereby certain rule provisions are transferred, as follows: Existing Rule 26(a) is transferred to Rules 30(a) and 31(a). Existing Rule 26(c) is transferred to Rule 30(c). Existing Rules 26(d), (e), and (f) are transferred to Rule 32. Revisions of the transferred provisions, if any, are discussed in the notes appended to Rules 30, 31, and 32. In addition, Rule 30(b) is transferred to Rule 26(c). The purpose of this rearrangement is to establish Rule 26 as a rule governing discovery in general. (The reasons are set out in the Advisory Committee's explanatory statement.)

Subdivision (a)—Discovery Devices. This is a new subdivision listing all of the discovery devices provided in the discovery rules and establishing the relationship between the general provisions of Rule 26 and the specific rules for particular discovery devices. The provision that the frequency of use of these methods is not limited confirms existing law. It incorporates in general form a provision now found in Rule 33.

Subdivision (b)—Scope of Discovery. This subdivision is recast to cover the scope of discovery generally. It regulates the discovery obtainable through any of the discovery devices listed in Rule 26(a).

All provisions as to scope of discovery are subject to the initial qualification that the court may limit discovery in accordance with these rules. Rule 26(c) (transferred from 30(b)) confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of 26(b), and these powers have always been freely exercised. For example, a party's income tax return is generally held not privileged, 2A Barron & Holtzoff, Federal Practice and Procedure, § 65.2 (Wright ed. 1961), and yet courts have recognized that interests in privacy may call for a measure of extra protection. *E.g., Wiesenberger* v. *W. E. Hutton & Co.*, 35 F.R.D. 556 (S.D.N.Y. 1964). Similarly, the courts have in appropriate circumstances protected materials that are primarily of an impeaching character. These two types of materials merely illustrate the many situations, not capable of governance by precise rule, in which courts must exercise judgment. The new subsections in Rule 26(d) do not change existing law with respect to such situations.

Subdivision (b)(1)—In General. The language is changed to provide for the scope of discovery in general terms. The existing subdivision, although in terms applicable only to depositions, is incorporated by reference in existing Rules 33 and 34. Since decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required and the making of discovery, whether voluntary or under court order, is not a concession or determination of relevance for purposes of trial. *Cf.* 4 Moore's Federal Practice ¶ 26-16[1] (2d ed. 1966).

Subdivision (b)(2)—Insurance Policies. Both cases and commentators are sharply in conflict on the question whether defendant's liability insurance coverage is subject to discovery in the usual situation when the insurance coverage is not itself admissible and does not bear on another issue on the case. Examples of Federal cases requiring disclosure and supporting comments: *Cook* v. *Welty*, 253 F.Supp. 875 (D.D.C. 1966) (cases cited); *Johanek* v. *Aberle*, 27 F.R.D. 272 (D. Mont. 1961); Williams, Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases, 10 Ala.L.Rev. 355 (1958); Thode. Some Reflections on the 1957 Amendments to the Texas Rules, 37 Tex.L.Rev. 33, 40-42 (1958). Examples of Federal cases refusing disclosure and supporting comments: Bisserier v. Manning, 207 F.Supp. 476 (D.N.J. 1962); Cooper v. Stender, 30 F.R.D. 389 (E.D.Tenn. 1962); Frank, Discovery and Insurance, Coverage 1959 Ins.L.J. 281; Fournier, Pre-Trial Discovery of Insurance Coverage and Limits, 28 Ford L.Rev. 215 (1959).

The division in reported cases is close. State decisions based on provisions similar to the federal rules are similarly divided. See cases collected in 2A Barron & Holtzoff, Federal Practice and Procedure § 647.1, nn. 45.5, 45.6 (Wright ed. 1961). It appears to be difficult if not impossible to obtain appellate review of the issue. Resolution by rule amendment is indicated. The question is essentially procedural in that it bears upon preparation for trial and settlement before trial, and courts confronting the question, however, they have decided it, have generally treated it as procedural and governed by the rules.

The amendment resolves this issue in favor of disclosure. Most of the decisions denying discovery, some explicitly, reason from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence; they avoid considerations of policy, regarding them as foreclosed. See *Bisserier* v. *Manning, supra.* Some note also that facts about a defendant's financial status are not discoverable as such, prior to judgment with execution unsatisfied, and fear that, if courts hold insurance coverage discoverable, they must extend the principle to other aspects of the defendant's financial status. The cases favoring disclosure rely heavily on the practical significance of insurance in the decisions lawyers make about settlement and trial preparation. In *Clauss* v. *Danker*, 264 F.Supp. 246 (S.D.N.Y. 1967), the court held that the rules forbid disclosure but called for an amendment to permit it.

Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.

Disclosure is required when the insurer "may be liable" on part or all of the judgment. Thus, an insurance company must disclose even when it contests liability under the policy, and such disclosure does not constitute a waiver of its claim. It is immaterial whether the liability is to satisfy the judgment directly or merely to indemnify or reimburse another after he pays the judgment.

The provision applies only to persons "carrying on an insurance business" and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification. *Cf.* N.Y.Ins. Law § 41. Thus, the provision makes no change in existing law on discovery of indemnity agreements other than insurance agreements by persons carrying on an insurance business. Similarly, the provision does not cover the business concern that creates a reserve fund for purposes of self-insurance.

For some purposes other than discovery, an application for insurance is treated as a part of the insurance agreement. The provision makes clear that, for discovery purposes, the application is not to be so treated.

The insurance application may contain personal and financial information concerning the insured, discovery of which is beyond the purpose of this provision.

In no instance does disclosure make the facts concerning insurance coverage admissible in evidence.

Subdivision (b)(3)—Trial Preparation: Materials. Some of the most controversial and vexing problems to emerge from the discovery rules have arisen out of requests for the production of documents or things prepared in anticipation of litigation or for trial. The existing rules make no explicit provision for such materials. Yet, two verbally distinct doctrines have developed, each conferring a qualified immunity on these materials—the "good cause" requirement in Rule 34 (now generally held applicable to discovery of documents via deposition under Rule 45 and interrogatories under Rule 33) and the work-product doctrine of *Hickman* v. *Taylor*, 329 U.S. 495 (1947). Both demand a showing of justification before production can be had, the one of "good cause" and the other variously described in the *Hickman* case: "necessity or justification," "denial * * * would unduly prejudice the preparation of petitioner's case," or "cause hardship or injustice" 329 U.S. at 509-510.

In deciding the *Hickman* case, the Supreme Court appears to have expressed a preference in 1947 for an approach to the problem of trial preparation materials by judicial decision rather than by rule. Sufficient experience has accumulated, however, with lower court applications of the *Hickman* decision to warrant a reappraisal.

The major difficulties visible in the existing case law are (1) confusion and disagreement as to whether "good cause" is made out by a showing of relevance and lack of privilege, or requires an additional showing of necessity, (2) confusion and disagreement as to the scope of the *Hickman* work-product doctrine, particularly whether it extends beyond work actually performed by lawyers, and (3) the resulting difficulty of relating the "good cause" required by Rule 34 and the "necessity or justification" of the work-product doctrine, so that their respective roles and the distinctions between them are understood.

Basic Standard. Since Rule 34 in terms requires a showing of "good cause" for the production of all documents and things, whether or not trial preparation is involved, courts have felt that a single formula is called for and have differed over whether a showing of relevance and lack of privilege is enough or whether more must be shown. When the facts of the cases are studied, however, a distinction emerges based upon the type of materials. With respect to documents not obtained or prepared with an eye to litigation, the decisions, while not uniform, reflect a strong and increasing tendency to relate "good cause" to a showing that the documents are relevant to the subject matter of the action. *E.g., Connecticut Mutual Life Ins. Co.* v. *Shields*, 17 F.R.D. 273 (S.D.N.Y. 1959), with cases cited; *Houdry Process Corp.* v. *Commonwealth Oil Refining Co.*, 24 F.R.D. 58 (S.D.N.Y. 1955); see *Bell* v. *Commercial Ins. Co.*, 280 F.2d 514, 517 (3d Cir. 1960). When the party whose documents are sought shows that the request for production is unduly burdensome or oppressive, courts have denied discovery for lack of "good cause", although they might just as easily have based their decision on the protective provisions of existing Rule 30(b) (new Rule 26(c)). *E.g., Lauer* v. *Tankrederi*, 39 F.R.D. 334 (E.D.Pa. 1966).

As to trial-preparation materials, however, the courts are increasingly interpreting "good cause" as requiring more than relevance. When lawyers have prepared or obtained the materials for trial, all courts require more than relevance; so much is clearly commanded by *Hickman*. But even as to the preparatory work of nonlawyers, while some courts ignore work-product and equate "good cause" with relevance, *e.g., Brown* v. *New York, N.H. & H. RR.*, 17 F.R.D. 324 (S.D.N.Y. 1955), the more recent trend is to read "good cause" as requiring inquiry into the importance of and need for the materials as well as into alternative sources for securing the same information. In *Guilford Nat'l Bank* v. *Southern Ry.*, 297 F.2d 921 (4th Cir. 1962), statements of witnesses obtained by claim agents were held not discoverable because both parties had had equal access to the witnesses at about the same time, shortly after the collision in question. The decision was based solely on Rule 34 and "good cause"; the court declined to rule on whether the statements were work-product. The court's treatment of "good cause" is quoted at length and with approval in *Schlagenhauf* v. *Holder*, 379 U.S. 104, 117-118 (1964). See also *Mitchell* v. *Bass*, 252 F. 2d 513 (8th Cir. 1958); *Hauger* v. *Chicago, R.I. & Pac. RR.*, 216 F.2d 501 (7th Cir. 1954); *Burke v. United States*, 32 F.R.D. 213 (E.D.N.Y. 1963). While the opinions dealing with "good cause" do not often draw an explicit distinction between trial preparation materials and other materials, in fact an overwhelming proportion of the cases in which special showing is required are cases involving trial preparation materials.

The rules are amended by eliminating the general requirement of "good cause" from Rule 34 but retaining a requirement of a special showing for trial preparation materials in this subdivision. The required showing is expressed, not in terms of "good cause" whose generality has tended to encourage confusion and controversy, but in terms of the elements of the special showing to be made: substantial need of the materials in the preparation of the case and inability without undue hardship to obtain the substantial equivalent of the materials by other means.

These changes conform to the holdings of the cases, when viewed in light of their facts. Apart from trial preparation, the fact that the materials sought are documentary does not in and of itself require a special showing beyond relevance and absence of privilege. The protective provisions are of course available, and if the party from whom production is sought raises a special issue of privacy (as with respect to income tax returns or grand jury minutes) or points to evidence primarily impeaching, or can show serious burden or expense, the court will exercise its traditional power to decide whether to issue a protective order. On the other hand, the requirement of a special showing for discovery of trial preparation materials reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side. See Field and McKusick, Maine Civil Practice 264 (1959).

Elimination of a "good cause" requirement from Rule 34 and the establishment of a requirement of a special showing in this subdivision will eliminate the confusion caused by having two verbally distinct requirements of justification that the courts have been unable to distinguish clearly. Moreover, the language of the subdivision suggests the factors which the courts should consider in determining whether the requisite showing has been made. The importance of the materials sought to the party seeking them in preparation of his case and the difficulty he will have obtaining them by other means are factors noted in the *Hickman* case. The courts should also consider the likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents the production of which he seeks.

Consideration of these factors may well lead the court to distinguish between witness statements taken by an investigator, on the one hand, and other parts of the investigative file, on the other. The court in *Southern Ry.* v. *Lanham*, 403 F.2d 119 (5th Cir. 1968), while it naturally addressed itself to the "good cause" requirements of Rule 34, set forth as controlling considerations the factors contained in the language of this subdivision. The analysis of the court suggests circumstances under which witness statements will be discoverable. The witness may have given a fresh and contemporaneous account in a written statement while he is available to the party seeking discovery only a substantial time thereafter. *Lanham, supra* at

127-128; *Guilford, supra* at 926. Or he may be reluctant or hostile. *Lanham, supra* at 128-129; *Brookshire* v. *Pennsylvania RR.*, 14 F.R.D. 154 (N.D.Ohio 1953); *Diamond* v. *Mohawk Rubber Co.*, 33 F.R.D. 264 (D. Colo. 1963). Or he may have a lapse of memory. *Tannenbaum* v. *Walker*, 16 F.R.D. 570 (E.D.Pa. 1954). Or he may probably be deviating from his prior statement. *Cf. Hauger* v. *Chicago, R.I. & Pac. RR.*, 216 F.2d 501 (7th Cir. 1954). On the other hand, a much stronger showing is needed to obtain evaluative materials in an investigator's reports. *Lanham, supra* at 131-133; *Pickett* v. *L. R. Ryan, Inc.*, 237 F.Supp. 198 (E.D.S.C. 1965).

Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision. *Gossman* v. *A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963); *cf. United States* v. *New York Foreign Trade Zone Operators, Inc.*, 304 F.2d 792 (2d Cir. 1962). No change is made in the existing doctrine, noted in the *Hickman* case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.

Treatment of Lawyers; Special Protection of Mental Impressions, Conclusions, Opinions, and Legal Theories Concerning the Litigation.—The courts are divided as to whether the work-product doctrine extends to the preparatory work only of lawyers. The *Hickman* case left this issue open since the statements in that case were taken by a lawyer. As to courts of appeals, compare *Alltmont* v. *United States*, 177 F.2d 971, 976 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950) (*Hickman* applied to statements obtained by FBI agents on theory it should apply to "all statements of prospective witnesses which a party has obtained for his trial counsel's use"), with *Southern Ry.* v. *Campbell*, 309 F.2d 569 (5th Cir. 1962) (statements taken by claim agents not work-product), and *Guilford Nat'l Bank* v. *Southern Ry.*, 297 F.2d 921 (4th Cir. 1962) (avoiding issue of work-product as to claim agents, deciding case instead under Rule 34 "good canse"). Similarly, the district courts are divided on statements obtained by claim agents, compare, *e.g., Brown* v. *New York, N.H. & H. RR.*, 17 F.R.D. 324 (S.D.N.Y. 1955) with *Hanke* v. *Milwaukee Electric Ry. & Transp. Co.*, 7 F.R.D. 540 (E.D. Wis. 1947); investigators, compare *Burke* v. *United States*, 32 F.R.D. 213 (E.D.N.Y.1963) with *Snyder* v. *United States*, 20 F.R.D. 7 (E.D.N.Y.1956); and insurers, compare *Gottlieb* v. *Bresler*, 24 F.R.D. 371 (D.D.C.1959) with *Burns* v. *Mulder*, 20 F.R.D. 605 (ED.Pa 1957). See 4 Moore's Federal Practice ¶ 26.23 [8.1] (2d ed. 1966); 2A Barron & Holtzoff, Federal Practice and Procedure § 652.2 (Wright ed. 1961).

A complication is introduced by the use made by courts of the "good cause" requirement of Rule 34, as described above. A court may conclude that trial preparation materials are not work-product because not the result of lawyer's work and yet hold that they are not producible because "good cause" has not been shown. *Cf. Guilford Nat'l Bank* v. *Southern Ry.*, 297 F.2d 921 (4th Cir. 1962), cited and described above. When the decisions on "good cause" are taken into account, the weight of authority affords protection of the preparatory work of both lawyers and nonlawyers (though not necessarily to the same extent) by requiring more than a showing of relevance to secure production.

Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf. The subdivision then goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents. In enforcing this provision of the subdivision, the courts will sometimes find it necessary to order disclosure of a document but with portions deleted.

Rules 33 and 36 have been revised in order to permit discovery calling for opinions, contentions, and admissions relating not only to fact but also to the application of law to fact. Under those rules, a party and his attorney or other representative may be required to disclose, to some extent, mental impressions, opinions, or conclusions. But documents or parts of documents containing these matters are protected against discovery by this subdivision. Even though a party may ultimately have to disclose in response to interrogatories or requests to admit, he is entitled to keep confidential documents containing such matters prepared for internal use.

Party's Right to Own Statement.—An exception to the requirement of this subdivision enables a party to secure production of his own statement without any special showing. The cases are divided. Compare, *e.g., Safeway Stores, Inc.* v. *Reynolds*, 176 F.2d 476 (D.C. Cir. 1949); *Shupe* v. *Pennsylvania RR.*, 19 F.R.D. 144 (W.D.Pa. 1956); with *e.g., New York Central RR.* v. *Carr*, 251 F.2d 433 (4th Cir. 1957); *Belback* v. *Wilson Freight Forwarding Co.*, 40 F.R.D. 16 (W.D.Pa. 1966).

Courts which treat a party's statement as though it were that of any witness overlook the fact that the party's statement is, without more, admissible in evidence. Ordinarily, a party gives a statement without insisting on a copy because he does not yet have a lawyer and does not understand the legal consequences of his actions. Thus, the statement is given at a time when he functions at a disadvantage. Discrepancies between his trial testimony and earlier statement may result from lapse of memory or ordinary inaccuracy; a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve. In appropriate cases the court may order a party to be deposed before his statement is produced. *E.g., Smith* v. *Central Linen Service Co.*, 39 F.R.D. 15 (D.Md. 1966); *McCoy* v. *General Motors Corp.*, 33 F.R.D. 354 (W.D.Pa. 1963).

Commentators strongly support the view that a party be able to secure his statement without a showing. 4 Moore's Federal Practice ¶ 26.23 [8.4] (2d ed. 1966); 2A Barron & Holtzoff, Federal Practice and Procedure § 652.3 (Wright ed. 1961); see also Note, Developments in the Law—Discovery, 74 Harv.L.Rev. 940, 1039 (1961). The following states have by statute or rule taken the same position: *Statutes:* Fla.Stat.Ann. § 92.33; Ga.Code Ann. § 38-2109(b); La.Stat.Ann.R.S. 13:3732; Mass.Gen.Laws Ann. c. 271, § 44; Minn.Stat.Ann. § 602.01; N.Y.C.P.L.R. § 3101(e). *Rules:* Mo.R.C.P. 56.01(a); N.Dak.R.C.P. 34(b); Wyo.R.C.P. 34(b); *cf.* Mich.G.C.R. 306.2.

In order to clarify and tighten the provision on statements by a party, the term "statement" is defined. The definition is adapted from 18 U.S.C. § 3500(e) (Jencks Act). The statement of a party may of course be that of plaintiff or defendant, and it may be that of an individual or of a corporation or other organization.

Witness' Right to Own Statement.—A second exception to the requirement of this subdivision permits a nonparty witness to obtain a copy of his own statement without any special showing. Many, though not all, of the considerations supporting a party's right to obtain his statement apply also to the non-party witness. Insurance companies are increasingly recognizing that a witness is entitled to a copy of his statement and are modifying their regular practice accordingly.

Subdivision (b)(4)—Trial Preparation: Experts. This is a new provision dealing with discovery of information (including facts and opinions) obtained by a party from an expert retained by that party in relation to litigation or obtained by the expert and not yet transmitted to the party. The subdivision deals separately

with those experts whom the party expects to call as trial witnesses and with those experts who have been retained or specially employed by the party but who are not expected to be witnesses. It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.

Subsection (b)(4)(A) deals with discovery of information obtained by or through experts who will be called as witnesses at trial. The provision is responsive to problems suggested by a relatively recent line of authorities. Many of these cases present intricate and difficult issues as to which expert testimony is likely to be determinative. Prominent among them are food and drug, patent, and condemnation cases. See, *e.g., United States* v. *Nysco Laboratories, Inc.*, 26 F.R.D. 159, 162 (E.D.N.Y. 1960) (food and drug); *E. I. du Pont de Nemours & Co.* v. *Phillips Petrolcum Co.*, 24 F.R.D. 416, 421 (D.Del. 1959) (patent); *Cold Metal Process Co.* v. *Aluminum Co. of America*, 7 F.R.D. 425 (N.D.Ohio 1947), aff'd. *Sachs* v. *Aluminum Co. of America*, 167 F.2d 570 (6th Cir. 1948) (same); *United States* v. *50.34 Acres of Land*, 13 F.R.D. 19 (E.D.N.Y. 1952) (condemnation).

In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. McGlothlin, Some Practical Problems in Proof of Economic, Scientific, and Technical Facts, 23 F.R.D. 467, 478 (1958). A California study of discovery and pretrial in condemnation cases notes that the only substitute for discovery of experts' valuation materials is "lengthy—and often fruitless—cross-examination during trial," and recommends pretrial exchange of such material. Calif.Law Rev.Comm'n, Discovery in Eminent Domain Proceedings 707-710 (Jan.1963). Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

These considerations appear to account for the broadening of discovery against experts in the cases cited where expert testimony was central to the case. In some instances, the opinions are explicit in relating expanded discovery to improved cross-examination and rebuttal at trial. *Franks* v. *National Dairy Products Corp.*, 41 F.R.D. 234 (W.D.Tex. 1966); *United States* v. *23.76 Acres*, 32 F.R.D. 593 (D.Md. 1963); see also an unpublished opinion of Judge Hincks, quoted in *United States* v. *48 Jars, etc.*, 23 F.R.D. 192, 198 (D.D.C. 1958). On the other hand, the need for a new provision is shown by the many cases in which discovery of expert trial witnesses is needed for effective cross-examination and rebuttal, and yet courts apply the traditional doctrine and refuse disclosure. *E.g., United States* v. *Certain Parcels of Land*, 25 F.R.D. 192 (N.D.Cal. 1959); *United States* v. *Certain Acres*, 18 F.R.D. 98 (M.D.Ga. 1955).

Although the trial problems flowing from lack of discovery of expert witnesses are most acute and noteworthy when the case turns largely on experts, the same problems are encountered when a single expert testifies. Thus, subdivision (b)(4)(A) draws no line between complex and simple cases, or between cases with many experts and those with but one. It establishes by rule substantially the procedure adopted by decision of the court in *Knighton* v. *Villian & Fassio*, 39 F.R.D. 11 (D.Md. 1965). For a full analysis of the problem and strong recommendations to the same effect, see Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan.L.Rev. 455, 485-488 (1962); Long, Discovery and Experts under the Federal Rules of Civil Procedure, 38 F.R.D. 111 (1965).

Past judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation. The procedure established in subsection (b)(4)(A) holds the risk to a minimum. Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts.

Subdivision (b)(4)(A) provides for discovery of an expert who is to testify at the trial. A party can require one who intends to use the expert to state the substance of the testimony that the expert is expected to give. The court may order further discovery, and it has ample power to regulate its timing and scope and to prevent abuse. Ordinarily, the order for further discovery shall compensate the expert for his time, and may compensate the party who intends to use the expert for past expenses reasonably incurred in obtaining facts or opinions from the expert. Those provisions are likely to discourage abusive practices.

Subdivision (b)(4)(B) deals with an expert who has been retained or specially employed by the party in anticipation of litigation or preparation for trial (thus excluding an expert who is simply a general employee of the party not specially employed on the case), but who is not expected to be called as a witness. Under its provisions, a party may discover facts known or opinions held by such an expert only on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Subdivision (b)(4)(B) is concerned only with experts retained or specially consulted in relation to trial preparation. Thus the subdivision precludes discovery against experts who were informally consulted in preparation for trial, but not retained or specially employed. As an ancillary procedure, a party may on a proper showing require the other party to name experts retained or specially employed, but not those informally consulted.

These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert, *e.g., American Oil Co.* v. *Pennsylvania Petroleum Products Co.*, 23 F.R.D. 680, 685-686 (D.R.I. 1959). See Louisell, Moderu California Discovery 315-316 (1963). They also reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine. See *United States* v. *McKay*, 372 F.2d 174, 176-177 (5th Cir. 1967). The provisions adopt a form of the more recently developed doctrine of "unfairness". See *e.g., United States* v. *23.76 Acres of Land*, 32 F.R.D. 593, 597 (D.Md. 1963); Louisell, *supra*, at 317-318; 4 Moore's Federal Practice § 26.24 (2d ed. 1966).

Under subdivision (b)(4)(C), the court is directed or authorized to issue protective orders, including an order that the expert be paid a reasonable fee for time spent in responding to discovery, and that the party whose expert is made subject to discovery be paid a fair portion of the fees and expenses that the party incurred in obtaining information from the expert. The court may issue the latter order as a condition of discovery, or it may delay the order until after discovery is completed. These provisions for fees and expenses meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum. *E.g., Lewis* v. *United Air Lines Transp. Corp.*, 32 F.Supp. 21 (W.D.Pa. 1940); *Walsh* v. *Reynolds Metal Co.*, 15 F.R.D. 376 (D.N.J. 1954). On the other hand, a party may not obtain discovery simply by offering to pay fees and expenses. *Cf. Boynton* v. *R. J. Reynolds Tobacco Co.*, 36 F.Supp. 593 (D.Mass. 1941).

In instances of discovery under subdivision (b)(4)(B), the court is directed to award fees and expenses to the

other party, since the information is of direct value to the discovering party's preparation of his case. In ordering discovery under (b)(4)(A)(ii), the court has discretion whether to award fees and expenses to the other party; its decision should depend upon whether the discovering party is simply learning about the other party's case or is going beyond this to develop his own case. Even in cases where the court is directed to issue a protective order, it may decline to do so if it finds that manifest injustice would result. Thus, the court can protect, when necessary and appropriate, the interests of an indigent party.

Subdivision (c)—Protective Orders. The provisions of existing Rule 30(b) are transferred to this subdivision (c), as part of the rearrangement of Rule 26. The language has been changed to give it application to discovery generally. The subdivision recognizes the power of the court in the district where a deposition is being taken to make protective orders. Such power is needed when the deposition is being taken far from the court where the action is pending. The court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending.

In addition, drafting changes are made to carry out and clarify the sense of the rule. Insertions are made to avoid any possible implication that a protective order does not extend to "time" as well as to "place" or may not safeguard against "undue burden or expense."

The new reference to trade secrets and other confidential commercial information reflects existing law. The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection. See, *e.g., Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965); *Julius M. Ames Co.* v. *Bostitch, Inc.*, 235 F.Supp. 856 (S.D.N.Y. 1964).

The subdivision contains new matter relating to sanctions. When a motion for a protective order is made and the court is disposed to deny it, the court may go a step further and issue an order to provide or permit discovery. This will bring the sanctions of Rule 37(b) directly into play. Since the court has heard the contentions of all interested persous, an affirmative order is justified. See Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Col.L.Rev. 480, 492-493 (1958). In addition, the court may require the payment of expenses incurred in relation to the motion.

Subdivision (d)—Sequence and Priority. This new provision is concerned with the sequence in which parties may proceed with discovery and with related problems of timing. The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court's power to establish priority by an order issued in a particular case.

A priority rule developed by some courts, which confers priority on the party who first serves notice of taking a deposition, is unsatisfactory in several important respects:

First, this priority rule permits a party to establish a priority running to all depositions as to which he has given earlier notice. Since he can on a given day serve notice of taking many depositions he is in a position to delay his adversary's taking of depositions for an inordinate time. Some courts have ruled that deposition priority also permits a party to delay his answers to interrogatories and production of documents. *E.g., E. I. du Pont de Nemours & Co.* v. *Phillips Petroleum Co.*, 23 *F.R.D.* 237 (D.Del. 1959); *but cf. Sturdevant* v. *Sears, Roebuck & Co.*, 32 F.R.D. 426 (W.D.Mo. 1963).

Second, since notice is the key to priority, if both parties wish to take depositions first a race results. See *Caldwell-Clements, Inc.* v. *McGraw-Hill Pub. Co.*, 11 F.R.D. 156 (S.D.N.Y. 1951) (description of tactics used by parties). But the existing rules on notice of deposition create a race with runners starting from different positions. The plaintiff may not give notice without leave of court until 20 days after commencement of the action, whereas the defendant may serve notice at any time after commencement. Thus, a careful and prompt defendant can almost always secure priority. This advantage of defendants is fortuitous, because the purpose of requiring plaintiff to wait 20 days is to afford defendant an opportunity to obtain counsel, not to confer priority.

Third, although courts have ordered a change in the normal sequence of discovery on a number of occasions, *e.g., Kaeppler* v. *James H. Matthews & Co.*, 200 F.Supp. 229 (E.D.Pa. 1961); *Park & Tilford Distillers Corp.* v. *Distillers Co.*, 19 F.R.D. 169 (S.D.N.Y. 1956), and have at all times avowed discretion to vary the usual priority, most commentators are agreed that courts in fact grant relief only for "the most obviously compelling reasons." 2A Barron & Holtzoff, Federal Practice and Procedure 447-47 (Wright ed. 1961); see also Younger, Priority of Pretrial Examination in the Federal Courts—A Comment, 34 N.Y.U.L.Rev. 1271 (1959); Freund, The Pleading and Pretrial of an Antitrust Claim, 46 Corn.L.Q. 555, 564, (1964). Discontent with the fairness of actual practice has been evinced by other observers. Comments, 59 Yale L.J. 117, 134-136 (1949); Yudkin, Some Refinements in Federal Discovery Procedure, 11 Fed.B.J. 289, 296-297 (1951); Developments in the Law-Discovery, 74 Harv.L.Rev. 940, 954-958 (1961).

Despite these difficulties, some courts have adhered to the priority rule, presumably because it provides a test which is easily understood and applied by the parties without much court intervention. It thus permits deposition discovery to function extrajudicially, which the rules provide for and the courts desire. For these same reasons, courts are reluctant to make numerous exceptions to the rule.

The Columbia Survey makes clear that the problem of priority does not affect litigants generally. It found that most litigants do not move quickly to obtain discovery. In over half of the cases, both parties waited at least 50 days. During the first 20 days after commencement of the action—the period when defendant might assure his priority by noticing depositions—16 percent of the defendants acted to obtain discovery. A race could not have occurred in more than 16 percent of the cases and it undoubtedly occurred in fewer. On the other hand, five times as many defendants as plaintiffs served notice of deposition during the first 19 days. To the same effect, see Comment, Tactical Use and Abuse of Depositions Under the Federal Rules, 59 Yale L.J. 117, 134 (1949).

These findings do not mean, however, that the priority rule is satisfactory or that a problem of priority does not exist. The court decisions show that parties do bottle on this issue and carry their disputes to court. The statistics show that these court cases are not typical. By the same token, they reveal that more extensive exercise of judicial discretion to vary the priority will not bring a flood of litigation, and that a change in the priority rule will in fact affect only a small fraction of the cases.

It is contended by some that there is no need to alter the existing priority practice. In support, it is urged that there is no evidence that injustices in fact result from present practice and that, in any event, the courts can and do promulgate local rules, as in New York, to deal with local situations and issue orders to avoid possible injustice in particular cases.

Subdivision (d) is based on the contrary view that the rule of priority based on notice is unsatisfactory and unfair in its operation. Subdivision (d) follows an approach adapted from Civil Rule 4 of the District Court for the Southern District of New York. That rule provides that starting 40 days after commencement of the action, unless otherwise ordered by the court, the fact that one part is taking a deposition shall not prevent another party from doing so "concurrenly." In practice, the depositions are not usually taken simultaneously; rather, the parties work out arrangements for alternation in the taking of depositions. One party may take a complete deposition and

then the other, or, if the depositions are extensive, one party deposes for a set time, and then the other. See *Caldwell-Clements, Inc.* v. *McGraw-Hill Pub. Co.*, 11 F.R.D. 156 (S.D.N.Y. 1951).

In principle, one party's initiation of discovery should not wait upon the other's completion, unless delay is dictated by special considerations. Clearly the principle is feasible with respect to all methods of discovery other than depositions. And the experience of the Southern District of New York shows that the principle can be applied to depositions as well. The courts have not had an increase in motion business on this matter. Once it is clear to lawyers that they bargain on an equal footing, they are usually able to arrange for an orderly succession of depositions without judicial intervention. Professor Moore has called attention to Civil Rule 4 and suggested that it may usefully be extended to other areas. 4 Moore's Federal Practice 1154 (2d ed. 1966).

The court may upon motion and by order grant priority in a particular case. But a local court rule purporting to confer priority in certain classes of cases would be inconsistent with this subdivision and thus void.

Subdivision (e)—Supplementation of Responses. The rules do not now state whether interrogatories (and questions at deposition as well as requests for inspection and admissions) impose a "continuing burden" on the responding party to supplement his answers if he obtains new information. The issue is acute when new information renders substantially incomplete or inaccurate an answer which was complete and accurate when made. It is essential that the rules provide an answer to this question. The parties can adjust to a rule either way, once they know what it is. See 4 Moore's Federal Practice ¶33.25[4] (2d ed. 1966).

Arguments can be made both ways. Imposition of a continuing burden reduces the proliferation of additional sets of interrogatories. Some courts have adopted local rules establishing such a burden. *E.g.*, E.D.Pa.R. 20(f), quoted in *Taggart* v. *Vermont Transp. Co.*, 32 F.R.D. 587 (E.D.Pa. 1963); D.Me.R.15(c). Others have imposed the burden by decision, *E.g.*, *Chenault* v. *Nebraska Farm Products, Inc.*, 9 F.R.D. 529, 533 (D.Nebr. 1949). On the other hand, there are serious objections to the burden, especially in protracted cases. Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information. But a full set of new answers may no longer be needed by the interrogating party. Some issues will have been dropped from the case, some questions are now seen as unimportant, and other questions must in any event be reformulated. See *Novick* v. *Pennsylvania RR.*, 18 F.R.D. 296, 298 (W.D.Pa. 1955).

Subdivision (e) provides that a party is not under a continuing burden except as expressly provided. *Cf.* Note, 68 Harv.L.Rev. 673, 677 (1955). An exception is made as to the identity of persons having knowledge of discoverable matters, because of the obvious importance to each side of knowing all witnesses and because information about witnesses routinely comes to each lawyer's attention. Many of the decisions on the issue of a continuing burden have in fact concerned the identity of witnesses. An exception is also made as to expert trial witnesses in order to carry out the provisions of Rule 26(b)(4). See *Diversified Products Corp.* v. *Sports Center Co.*, 42 F.R.D. 3 (D.Md. 1967).

Another exception is made for the situation in which a party, or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect. This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney. Finally, a duty to supplement may be imposed by order of the court in a particular case (including an order resulting from a pretrial conference) or by agreement of the parties. A party may of course make a new discovery request which requires supplementation of prior responses.

The duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate.

CROSS REFERENCES

Certification and filing of depositions, see rule 30.

Consequences of refusal to appear for deposition, see rule 37.

Continuance to procure depositions opposing motion for summary judgment, see rule 56.

Depositions—

Before action or pending appeal, see rule 27.

Of witnesses upon written interrogatories, see rule 31.

Opposing motion for summary judgment, see rule 56.

Effect of errors and irregularities in depositions, see rule 32.

Examination and cross-examination of deponents, see rule 43.

Failure to attend or serve subpoena, expenses, see rule 30.

Motion to terminate or limit examination, see rule 30.

Notice for taking deposition, see rule 30.

Objections to admissibility of depositions, see rule 32.

Order compelling answer to question propounded upon oral examination, see rule 37.

Orders for protection of parties and deponents, see rule 30.

Persons before whom depositions may be taken, see rule 28.

Record of examination, see rule 30.

Stipulations regarding taking depositions, see rule 29.

Subpoena for taking depositions, see rule 45.

Time and place for depositions, see rules 30 and 45.

Written interrogatories of party, see rule 33.

Rule 27. Depositions Before Action or Pending Appeal

(a) Before Action

(1) *Petition.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) *Notice and Service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse

party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

(3) *Order and Examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) *Use of Deposition.* If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 32(a).

(b) Pending appeal

If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c) Perpetuation by action

This rule does not limit the power of a court to entertain an action to perpetuate testimony.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 1, 1971, eff. July 1, 1971.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). This rule offers a simple method of perpetuating testimony in cases where it is usually allowed under equity practice or under modern statutes. See *Arizona* v. *California,* 292 U.S. 341, 54 S.Ct. 735, 78 L.Ed. 1298 (1934); *Todd Engineering Dry Dock and Repair Co.* v. *United States,* 32 F.2d 734 (C.C.A.5th, 1929); *Hall* v. *Stout,* 4 Del. ch. 269 (1871). For comparable state statutes see Ark.Civ.Code (Crawford, 1934) §§ 666-670; Calif.Code Civ.Proc. (Deering, 1937) 2083-2089; Ill.Rev.Stat. (1937) ch. 51, §§ 39-46; Iowa Code (1935) §§ 11400-11407; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 233, § 46-63; N.Y.C.P.A. (1937) § 295; Ohio Gen.Code Ann. ((Throckmorton, 1936) § 12216-12222; Va.Code Ann. (Michie, 1936) § 6235; Wisc.Stat. (1935) §§ 326.27-326.29. The appointment of an attorney to represent absent parties or parties not personally notified, or a guardian ad litem to represent minors and incompetents, is provided for in several of the above statutes.

Note to Subdivision (b). This follows the practice approved in *Richter* v. *Union Trust Co.,* 115 U.S. 55, 5 S.Ct. 1162, 29 L.Ed. 345 (1885), by extending the right to perpetuate testimony to cases pending an appeal.

Note to Subdivision (c). This preserves the right to employ a separate action to perpetuate testimony under U.S.C., Title 28, former § 644 (Depositions under *dedimus potestatem* and *in perpetuam*) as an alternate method.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. Since the second sentence in subdivision (a)(3) refers only to depositions, it is arguable that Rules 34 and 35 are inapplicable in proceedings to perpetuate testimony. The new matter [in subdivisions (a)(3) and (b)] clarifies. A conforming change is also made in subdivision (b).

NOTES OF ADVISORY COMMITTEE ON 1971 AMENDMENT TO RULES

The reference intended in this subdivision is to the rule governing the use of depositions in court proceedings. Formerly Rule 26(d), that rule is now Rule 32(a). The subdivision is amended accordingly.

AMENDMENTS

1948—The amendment effective October 1949, substituted the words "United States district court" in subdivision (a)(1) and (4) for "district court of the United States".

CROSS REFERENCES

Persons before whom depositions may be taken, see rule 28.

Rule 28. Persons Before Whom Depositions May Be Taken

(a) Within the United States

Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(b) In foreign countries

In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) Disqualification for interest

No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

In effect this rule is substantially the same as U.S.C., Title 28, former § 639 (Depositions *de bene esse;* when and where taken; notice). U.S.C., Title 28, former § 642 (Depositions, acknowledgements, and affidavits taken by notaries public) does not conflict with subdivision (a).

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. The added language [in subdivision (a)] provides for the situation, occasionally arising, when depositions must be taken in an isolated place where there is no one readily available who has the power to administer oaths and take testimony according to the terms of the rule as originally stated. In addition, the amendment affords a more convenient method of securing depositions in the case where state lines intervene between the location of various witnesses otherwise rather closely grouped. The amendment insures that the person appointed shall have adequate power to perform his duties. It has been held that a person authorized to act in the premises, as, for example, a master, may take testimony outside the district of his appointment. *Consolidated Fastener Co.* v. *Columbian Button & Fastener Co.*, C.C.N.D.N.Y. 1898, 85 Fed. 54; *Mathieson Alkali Works* v. *Arnold Hoffman & Co.*, C.C.A.1st, 1929, 31 F.2d 1.

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

The amendment of clause (1) is designed to facilitate depositions in foreign countries by enlarging the class of persons before whom the depositions may be taken on notice. The class is no longer confined, as at present, to a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States. In a country that regards the taking of testimony by a foreign official in aid of litigation pending in a court of another country as an infringement upon its sovereignty, it will be expedient to notice depositions before officers of the country in which the examination is taken. See generally Symposium Letters, Rogatory (Grossman ed. 1956); Doyle, Taking Evidence by Deposition and Letters Rogatory and Obtaining Documents in Foreign Territory, Proc. A.B.A., Sec. Int'l & Comp. L. 37 (1959); Heilpern, Procuring Evidence Abroad, 14 Tul.L.Rev. 29 (1939); Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L.J. 515, 526-29 (1953); Smit, International Aspects of Federal Civil Procedure, 61 Colum.L.Rev. 1031, 1056-58 (1961).

Clause (2) of amended subdivision (b), like the corresponding provision of subdivision (a) dealing with depositions taken in the United States, makes it clear that the appointment of a person by commission in itself confers power upon him to administer any necessary oath.

It has been held that a letter rogatory will not be issued unless the use of a notice or commission is shown to be impossible or impractical. See, e.g., *United States* v. *Matles*, 154 F.Supp. 574 (E.D.N.Y. 1957); *The Edmund Fanning*, 89 F.Supp. 282 (E.D.N.Y. 1950); *Branyan* v. *Koninklijke Luchtvaart Maatschappij*, 13 F.R.D. 425 (S.D.N.Y. 1953). See also *Ali Akber Kiachif* v. *Philco International Corp.*, 10 F.R.D. 277 (S.D.N.Y. 1950). The intent of the fourth sentence of the amended subdivision is to overcome this judicial antipathy and to permit a sound choice between depositions under a letter rogatory and on notice or by commission in the light of all the circumstances. In a case in which the foreign country will compel a witness to attend or testify in aid of a letter rogatory but not in aid of a commission, a letter rogatory may be preferred on the ground that it is less expensive to execute, even if there is plainly no need for compulsive process. A letter rogatory may also be preferred when it cannot be demonstrated that a witness will be recalcitrant or when the witness states that he is willing to testify voluntarily, but the contingency exists that he will change his mind at the last moment. In the latter case, it may be advisable to issue both a commission and a letter rogatory, the latter to be executed if the former fails. The choice between a letter rogatory and a commission may be conditioned by other factors, including the nature and extent of the assistance that the foreign country will give to the execution of either.

In executing a letter rogatory the courts of other countries may be expected to follow their customary procedure for taking testimony. See *United States* v. *Paraffin Wax, 2255 Bags*, 23 F.R.D. 289 (E.D.N.Y. 1959). In many non-common-law countries the judge questions the witness, sometimes without first administering an oath, the attorneys put any supplemental questions either to the witness or through the judge, and the judge dictates a summary of the testimony, which the witness acknowledges as correct. See Jones, supra, at 530-32; Doyle, supra, at 39-41. The last sentence of the amended subdivision provides, contrary to the implications of some authority, that evidence recorded in such a fashion need not be excluded on that account. See The Mandu, 11 F.Supp. 845 (E.D.N.Y. 1935). But cf. *Nelson* v. *United States*, 17 Fed.Cas. 1340 (No. 10,116) (C.C.D. Pa. 1816); *Winthrop* v. *Union Ins. Co.*, 30 Fed.Cas. 376 (No. 17901) (C.C.D.Pa. 1807). The specific reference to the lack of an oath or a verbatim transcript is intended to be illustrative. Whether or to what degree the value or weight of the evidence may be affected by the method of taking or recording the testimony is left for determination according to the circumstances of the particular case, cf. *Uebersee Finanz-Korporation, A.G.* v. *Brownell*, 121 F.Supp. 420 (D.D.C. 1954); *Danisch* v. *Guardian Life Ins. Co.*, 19 F.R.D. 235 (S.D.N.Y. 1956); the testimony may indeed be so devoid of substance or probative value as to warrant its exclusion altogether.

Some foreign countries are hostile to allowing a deposition to be taken in their country, especially by notice or commission, or to lending assistance in the taking of a deposition. Thus compliance with the terms of amended subdivision (b) may not in all cases ensure completion of a deposition abroad. Examination of the law and policy of the particular foreign country in advance of attempting a deposition is therefore advisable. See 4 Moore's Federal Practice ¶¶ 28.05-28.08 (2d ed. 1950).

CROSS REFERENCES

Certification and filing of depositions by officer, see rule 30.

Compensation of person taking deposition, see section 1821 of this title.

Foreign witnesses, depositions of, see section 1781 of this title.

Letters rogatory, failure to respond, see rule 37.

Taking responses to written interrogatories and preparation of record, see rule 31.

United States commissioners—

Authority to take depositions, see section 637 of this title.

Fees for taking and certifying depositions, see section 633 of this title.

Waiver as to disqualification of officer, see rule 32.

Rule 29. Stipulations Regarding Discovery Procedure

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court.

(As amended Mar. 30, 1970, eff. July 1, 1970.)

NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

There is no provision for stipulations varying the procedures by which methods of discovery other than depositions are governed. It is common practice for parties to agree on such variations, and the amendment recognizes such agreements and provides a formal mechanism in the rules for giving them effect. Any stipulation varying the procedures may be superseded by court order, and stipulations extending the time for response to discovery under Rules 33, 34, and 36 require court approval.

Rule 30. Depositions Upon Oral Examination

(a) When depositions may be taken

After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Notice of examination: general requirements; special notice; non-stenographic recording; production of documents and things; disposition of organization

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this subdivision (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the requests.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons

so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(c) Examination and cross-examination; record of examination; oath; objections

Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to terminate or limit examination

At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Submission to witness; changes; signing

When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and filing by officers; exhibits; copies; notice of filing

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) Failure to attend or to serve subpoena; expenses

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 30, 1970, eff. July 1, 1970; Mar. 1, 1971, eff. July 1, 1971; Nov. 20, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). This is in accordance with common practice. See U.S.C., Title 28, former § 639 (Depositions *de bene esse;* when and where taken; notice), the relevant provisions of which are incorporated in this rule; Calif.Code Civ.Proc. (Deering, 1937) § 2031; and statutes cited in respect to notice in the Note to Rule 26 (a). The provision for enlarging or shortening the time of notice has been added to give flexibility to the rule.

Note to Subdivisions (b) and (d). These are introduced as a safeguard for the protection of parties and deponents on account of the unlimited right of discovery given by Rule 26.

Note to Subdivisions (c) and (e). These follow the general plan of former Equity Rule 51 (Evidence Taken Before Examiners, Etc.) and U. S. C., Title 28, former § 640 (Depositions *de bene esse;* mode of taking), and former § 641 (Same; transmission to court), but are more specific. They also permit the deponent to require the officer to make changes in the deposition if the deponent is not satisfied with it. See also former Equity Rule 50 (Stenographer-Appointment-Fees).

Note to Subdivision (f). Compare former Equity Rule 55 (Depositions Deemed Published When Filed).

Note to Subdivision (g). This is similar to 2 Minn. Stat. (Mason, 1927) § 9833, but is more extensive.

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

This amendment corresponds to the change in Rule 4(d)(4). See the Advisory Committee's Note to that amendment.

NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

Subdivision (a). This subdivision contains the provisions of existing Rule 26(a), transferred here as part of the rearrangement relating to Rule 26. Existing Rule 30(a) is transferred to 30(b). Changes in language have been made to conform to the new arrangement.

This subdivision is further revised in regard to the requirement of leave of court for taking a deposition. The present procedure, requiring a plaintiff to obtain leave of court if he serves notice of taking a deposition within 20 days after commencement of the action, is changed in several respects. First, leave is required by reference to the time the deposition is to be taken rather than the date of serving notice of taking. Second, the 20-day period is extended to 30 days and runs from the service of summons and complaint on any defendant, rather than the commencement of the action. *Cf.* Ill. S.Ct.R. 19-1, S-H Ill.Ann.Stat. § 101.19-1. Third, leave is not required beyond the time that defendant initiates discovery, thus showing that he has retained counsel. As under the present practice, a party not afforded a reasonable opportunity to appear at a deposition, because he has not yet been served with process, is protected against use of the deposition at trial against him. See Rule 32(a), transferred from 26(d). Moreover, he can later redepose the witness if he so desires.

The purpose of requiring the plaintiff to obtain leave of court is, as stated by the Advisory Committee that proposed the present language of Rule 26(a), to protect "a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit." Note to 1948 amendment of Rule 26(a), quoted in 3A Barron & Holtzoff, Federal Practice and Procedure 455-456 (Wright ed. 1958). In order to assure defendant of this opportunity, the period is lengthened to 30 days. This protection, however, is relevant to the time of taking the deposition, not to the time that notice is served. Similarly, the protective period should run from the service of process rather than the filing of the complaint with the court. As stated in the note to Rule 26(d), the courts have used the service of notice as a convenient reference point for assigning priority in taking depositions, but with the elimination of priority in new Rule 26(d) the reference point is no longer needed. The new procedure is consistent in principle with the provisions of Rules 33, 34, and 36 as revised.

Plaintiff is excused from obtaining leave even during the initial 30-day period if he gives the special notice provided in subdivision (b)(2). The required notice must state that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or out of the United States, or on a voyage to sea, and will be unavailable for examination unless deposed within the 30-day period. These events occur most often in maritime litigation, when seamen are transferred from one port to another or are about to go te sea. Yet, there are analogous situations in nonmaritime litigation, and although the maritime problems are more common, a rule limited to claims in the admirality and maritime jurisdiction is not justified.

In the recent unification of the civil and admiralty rules, this problem was temporarily met through addition in Rule 26(a) of a provision that depositions de bene esse may continue to be taken as to admiralty and maritime claims witnin the meaning of Rule 9(h). It was recognized at the time that "a uniform rule applicable alike to what are now civil actions and suits in admiralty" was clearly preferable, but the de bene esse procedure was adopted "for the time being at least." See Advisory Committee's note in Report of the Judicial Conference: Proposed Amendments to Rules of Civil Procedure 43-44 (1966).

The changes in Rule 30(a) and the new Rule 30 (b)(2) provide a formula applicable to ordinary civil as well as maritime claims. They replace the provision for depositions de bene esse. They authorize an early deposition without leave of court where the witness is about to depart and, unless his deposition is promptly taken, (1) it will be impossible or very difficult to depose him before trial or (2) his deposition can later be taken but only with substantially increased effort and expense. *Cf. S.S. Hai Chang,* 1966 A.M.C. 2239 (S.D.N.Y. 1966), in which the deposing party is required to prepay expenses and counsel fees of the other party's lawyer when the action is pending in New York and depositions are te be taken on the West Coast. Defendant is protected by a provision that the deposition cannot be used against him if he was unable through exercise of diligence to obtain counsel to represent him.

The distance of 100 miles from place of trial is derived from the *de bene esse* provision and also conforms to the reach of a subpoena of the trial court, as provided in Rule 45(e). See also S.D.N.Y. Civ.R. 5(a). Some parts of the de bene esse provision are omitted from Rule 30(b)(2). Modern deposition practice adequately covers the witness who lives more than 100 miles away from place of trial. If a witness is aged or infirm, leave of court can be obtained.

Subdivision (b). Existing Rule 30(b) on protective orders has been transferred to Rule 26(c), and existing Rule 30(a) relating to the notice of taking deposition has been transferred to this subdivision. Because new material has been added, subsection numbers have been inserted.

Subdivision (b)(1). If a subpoena duces tecum is to be served, a copy thereof or a designation of the materials to be produced must accompany the notice. Each party is thereby enabled to prepare for the deposition more effectively.

Subdivision (b)(2). This subdivision is discussed in the note to subdivision (a), to which it relates.

Subdivision (b)(3). This provision is derived from existing Rule 30(a), with a minor change of language.

Subdivision (b)(4). In order to facilitate less expensive procedures, provision is made for the recording of testimony by other than stenographic means—*e.g.,* by mechanical, electronic, or photographic means. Because these methods give rise to problems of accuracy and trustworthiness, the party taking the deposition is required to apply for a court order. The order is to specify how the testimony is to be recorded, preserved,

and filed, and it may contain whatever additional safeguards the court deems necessary.

Subdivision (*b*)(*5*). A provision is added to enable a party, through service of notice, to require another party to produce documents or things at the taking of his deposition. This may now be done as to a nonparty deponent through use of a subpoena duces tecum as authorized by Rule 45, but some courts have held that documents may be secured from a party only under Rule 34. See 2A Barron & Holtzoff, Federal Practice and Procedure § 644:1 n. 83.2, § 792 n. 16 (Wright ed. 1961). With the elimination of "good cause" from Rule 34, the reason for this restrictive doctrine has disappeared. *Cf.* N.Y.C.P.L.R. § 3111.

Whether production of documents or things should be obtained directly under Rule 34 or at the deposition under this rule will depend on the nature and volume of the documents or things. Both methods are made available. When the documents are few and simple, and closely related to the oral examination, ability to proceed via this rule will facilitate discovery. If the discovering party insists on examining many and complex documents at the taking of the deposition, thereby causing undue burdens on others, the latter may, under Rules 26(c) or 30(d), apply for a court order that the examining party proceed via Rule 34 alone.

Subdivision (*b*)(*6*). A new provision is added, whereby a party may name a corporation, partnership, association, or governmental agency as the deponent and designate the matters on which he requests examination, and the organization shall then name one or more of its officers, directors, or managing agents, or other persons consenting to appear and testify on its behalf with respect to matters known or reasonably available to the organization. *Cf.* Alberta Sup.Ct.R. 255. The organization may designate persons other than officers, directors, and managing agents, but only with their consent. Thus, an employee or agent who has an independent or conflicting interest in the litigation—for example, in a personal injury case—can refuse to testify on behalf of the organization.

This procedure supplements the existing practice whereby the examining party designates the corporate official to be deposed. Thus, if the examining party believes that certain officials who have not testified pursuant to this subdivision have added information, he may depose them. On the other hand, a court's decision whether to issue a protective order may take account of the availability and use made of the procedures provided in this subdivision.

The new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process. It will reduce the difficulties now encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a "managing agent." See Note, Discovery Against Corporations Under the Federal Rules, 47 Iowa L.Rev. 1006-1016 (1962). It will curb the "bandying" by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it. *Cf. Haney* v. *Woodward & Lothrop, Inc.*, 330 F.2d 940, 944 (4th Cir. 1964). The provisions should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge. Some courts have held that under the existing rules a corporation should not be burdened with choosing which person is to appear for it. *E.g., United States* v. *Gahagan Dredging Corp.*, 24 F.R.D. 328, 329 (S.D.N.Y. 1958). This burden is not essentially different from that of answering interrogatories under Rule 33, and is in any case lighter than that of an examining party ignorant of who in the corporation has knowledge.

Subdivision (*c*). A new sentence is inserted at the beginning, representing the transfer of existing Rule 26(c) to this subdivision. Another addition conforms to the new provision in subdivision (b)(4).

The present rule provides that transcription shall be carried out unless all parties waive it. In view of the many depositions taken from which nothing useful is discovered, the revised language provides that transcription is to be performed if any party requests it. The fact of the request is relevant to the exercise of the court's discretion in determining who shall pay for transcription.

Parties choosing to serve written questions rather than participate personally in an oral deposition are directed to serve their questions on the party taking the deposition, since the officer is often not identified in advance. Confidentiality is preserved, since the questions may be served in a sealed envelope.

Subdivision (*d*). The assessment of expenses incurred in relation to motions made under this subdivision (d) is made subject to the provisions of Rule 37(a). The standards for assessment of expenses are more fully set out in Rule 37(a), and these standards should apply to the essentially similar motions of this subdivision.

Subdivision (*e*). The provision relating to the refusal of a witness to sign his deposition is tightened through insertion of a 30-day time period.

Subdivision (*f*)(*1*). A provision is added which codifies in a flexible way the procedure for handling exhibits related to the deposition and at the same time assures each party that he may inspect and copy documents and things produced by a nonparty witness in response to subpoena duces tecum. As a general rule and in the absence of agreement to the contrary or order of the court, exhibits produced without objection are to be annexed to and returned with the deposition, but a witness may substitute copies for purposes of marking and he may obtain return of the exhibits. The right of the parties to inspect exhibits for identification and to make copies is assured. *Cf.* N.Y.C.P.L.R. § 3116(c).

Notes of Advisory Committee on 1971 Amendment to Rules

The subdivision permits a party to name a corporation or other form of organization as a deponent in the notice of examination and to describe in the notice the matters about which discovery is desired. The organization is then obliged to designate natural persons to testify on its behalf. The amendment clarifies the procedure to be followed if a party desires to examine a non-party organization through persons designated by the organization. Under the rules, a subpoena rather than a notice of examination is served on a non-party to compel attendance at the taking of a deposition. The amendment provides that a subpoena may name a non-party organization as the deponent and may indicate the matters about which discovery is desired. In that event, the non-party organization must respond by designating natural persons, who are then obliged to testify as to matters known or reasonably available to the organization. To insure that a non-party organization that is not represented by counsel has knowledge of its duty to designate, the amendment directs the party seeking discovery to advise of the duty in the body of the subpoena.

Notes of Advisory Committee on 1972 Amendment to Rules

Subdivision (*c*). Existing. Rule 43(b), which is to be abrogated, deals with the use of leading questions, the calling, interrogation, impeachment, and scope of cross-examination of adverse parties, officers, etc. These topics are dealt with in many places in the Rules of Evidence. Moreover, many pertinent topics included in the Rules of Evidence are not mentioned in Rule 43(b), e.g. privilege. A reference to the Rules of Evidence generally is therefore made in subdivision (c) of Rule 30.

Effective Date of Amendment Proposed November 20, 1972

Amendment of this rule embraced by the order entered by the Supreme Court of the United States on

November 20, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub. L. 93-595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2071 of this title.

CROSS REFERENCES

Discovery and production of documents and things for inspection, copying, or photographing, see rule 34.
Effect of taking or using depositions, see rule 26.
Errors or irregularities in depositions, effect, see rule 32.
Motion to suppress deposition, see rule 32.
Notary public and other persons authorized to administer oaths required by laws of the United States, see section 2903 of Title 5, Government Organization and Employees.
Objections to admissibility of deposition, see rule 26.
Orders for protection of party on written interrogatories, see rule 33.
Persons before whom deposition may be taken, see rule 28.
Place of examination, see rule 45.
Power of person appointed by court to take deposition to administer oaths and take testimony, see rule 28.
Scope of examination, see rule 26.
Stipulations regarding discovery procedure, see rule 29.
Subpoena for taking depositions, see rule 45.
Time of taking depositions, see rule 26.
United States magistrates, power to administer oaths and take depositions, see section 636 of this title.
Waiver of objections, see rule 32.

Rule 31. Depositions Upon Written Questions

(a) Serving questions; notice

After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) Officer to take responses and prepare record

A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) Notice of filing

When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(As amended Mar. 30, 1970, eff. July 1, 1970.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule is in accordance with common practice. In most of the states listed in the Note to Rule 26(a), provisions similar to this rule will be found in the statutes which in their respective statutory compilations follow those cited in the Note to Rule 26(a).

NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

Confusion is created by the use of the same terminology to describe both the taking of a deposition upon "written interrogatories" pursuant to this rule and the serving of "written interrogatories" upon parties pursuant to Rule 33. The distinction between these two modes of discovery will be more readily and clearly grasped through substitution of the word "questions" for "interrogatories" throughout this rule.

Subdivision (a). A new paragraph is inserted at the beginning of this subdivision to conform to the rearrangement of provisions in Rules 26(a), 30(a), and 30(b).

The revised subdivision permits designation of the deponent by general description or by class or group. This conforms to the practice for depositions on oral examination.

The new procedure provided in Rule 30(b)(6) for taking the deposition of a corporation or other organization through persons designated by the organization is incorporated by reference.

The service of all questions, including cross, redirect, and recross, is to be made on all parties. This will inform the parties and enable them to participate fully in the procedure.

The time allowed for service of cross, redirect, and recross questions has been extended. Experience with the existing time limits shows them to be unrealistically short. No special restriction is placed on the time for serving the notice of taking the deposition and the first set of questions. Since no party is required to serve cross questions less than 30 days after the notice and questions are served, the defendant has sufficient time to obtain counsel. The court may for cause shown enlarge or shorten the time.

Subdivision (d). Since new Rule 26(c) provides for protective orders with respect to all discovery, and expressly provides that the court may order that one discovery device be used in place of another, subdivision (d) is eliminated as unnecessary.

CROSS REFERENCES

Written interrogatories of a party, see rule 33.

Rule 32. Use of Depositions in Court Proceedings

(a) Use of depositions

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any State has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(b) Objections to admissibility

Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

[(c) Abrogated]

(d) Effect of errors and irregularities in depositions

(1) *As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) *As to disqualification of officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to taking of deposition.*

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

(As amended Mar. 30, 1970, eff. July 1, 1970; Nov. 20, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule is in accordance with common practice. In most of the states listed in the Note to Rule 26, provisions similar to this rule will be found in the statutes which in their respective statutory compilations follow those cited in the Note to Rule 26.

NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

As part of the rearrangement of the discovery rules, existing subdivisions (d), (e), and (f) of Rule 26 are transferred to Rule 32 as new subdivisions (a), (b), and (c). The provisions of Rule 32 are retained as subdivision (d) of Rule 32 with appropriate changes in the lettering and numbering of subheadings. The new rule is given a suitable new title. A beneficial byproduct of the rearrangement is that provisions which are naturally related to one another are placed in one rule.

A change is made in new Rule 32(a), whereby it is made clear that the rules of evidence are to be applied to depositions offered at trial as though the deponent were then present and testifying at trial. This eliminates the possibility of certain technical hearsay objections which are based, not on the contents of deponent's testimony, but on his absence from court. The language of present Rule 26(d) does not appear to authorize these technical objections, but it is not entirely clear. Note present Rule 26(e), transferred to Rule 32(b); see 2A Barron & Holtzoff, Federal Practice and Procedure 164–166 (Wright ed. 1961).

An addition in Rule 32(a)(2) provides for use of a deposition of a person designated by a corporation or other organization, which is a party, to testify on its behalf. This complements the new procedure for taking the deposition of a corporation or other organization provided in Rules 30(b)(6) and 31(a). The addition is appropriate, since the deposition is in substance and effect that of the corporation or other organization which is a party.

A change is made in the standard under which a party offering part of a deposition in evidence may be required to introduce additional parts of the deposition. The new standard is contained in a proposal made by the Advisory Committee on Rules of Evidence. See Rule 1-07 and accompanying Note, Preliminary Draft of Proposed Rules of Evidence for the

United States District Courts and Magistrates 21-22 (March, 1969).

References to other rules are changed to conform to the rearrangement, and minor verbal changes have been made for clarification. The time for objecting to written questions served under Rule 31 is slightly extended.

NOTES OF ADVISORY COMMITTEE ON 1972 AMENDMENT TO RULES

Subdivision (e). The concept of "making a person one's own witness" appears to have had significance principally in two respects: impeachment and waiver of incompetency. Neither retains any vitality under the Rules of Evidence. The old prohibition against impeaching one's own witness is eliminated by Evidence Rule 607. The lack of recognition in the Rules of Evidence of state rules of incompetency in the Dead Man's area renders it unnecessary to consider aspects of waiver arising from calling the incompetent party witness. Subdivision (c) is deleted because it appears to be no longer necessary in the light of the Rules of Evidence.

EFFECTIVE DATE OF AMENDMENT PROPOSED NOVEMBER 20, 1972

Amendment of this rule embraced by the order entered by the Supreme Court of the United States on November 20, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub. L. 93-595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2071 of this title.

CROSS REFERENCES

Notary public and other persons authorized to administer oaths required by laws of the United States, see section 2903 of Title 5, Government Organization and Employees.

Rejection of deposition by court after refusal to sign, see rule 30.

Rule 33. Interrogatories to Parties

(a) Availability; procedures for use

Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) Scope; use at trial

Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) Option to produce business records

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule restates the substance of former Equity Rule 58 (Discovery—Interrogateries—Inspection and Production of Documents—Admission of Execution or Genuineness), with modifications to conform to these rules.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. The added second sentence in the first paragraph of Rule 33 conforms with a similar change in Rule 26(a) and will avoid litigation as to when the interrogatories may be served. Original Rule 33 does not state the times at which parties may serve written interrogatories upon each other. It has been the accepted view, however, that the times were the same in Rule 33 as those stated in Rule 26(a). *United States* v. *American Solvents & Chemical Corp. of California*, D.Del. 1939, 30 F.Supp. 107; *Sheldon* v. *Great Lakes Transit Corp.*, W.D.N.Y. 1942, 2 F.R.D. 272, 5 Fed.Rules Serv. 33.11, Case 3; *Musher Foundation, Inc.*, v. *Alba Trading Co.*, S.D.N.Y. 1941, 42 F.Supp. 281; 2 Moore's Federal Practice, 1938, 2621. The time within which leave of court must be secured by a plaintiff has been fixed at 10 days, in view of the fact that a defendant has 10 days within which to make objections in any case, which should give him ample time to engage counsel and prepare.

Further in the first paragraph of Rule 33, the word "service" is substituted for "delivery" in conformance with the use of the word "serve" elsewhere in the rule and generally throughout the rules. See also Note to Rule 13(a) herein. The portion of the rule dealing with practice on objections has been revised so as to afford a clearer statement of the procedure. The addition of the words "to interrogatories to which objection is made" insures that only the answers to the objectionable interrogatories may be deferred, and that the answers to interrogatories not objectionable shall be forthcoming within the time prescribed in the rule. Under the original wording, answers to all interrogatories may be withheld until objections, sometimes to but a few interrogatories, are determined. The amendment expedites the procedure of the rule and serves to eliminate the strike value of objections to minor inter-

rogatories. The elimination of the last sentence of the original rule is in line with the policy stated subsequently in this note.

The added second paragraph in Rule 33 contributes clarity and specificity as to the use and scope of interrogateries to the parties. The field of inquiry will be as broad as the scope of examination under Ruie 26(b). There is no reason why interrogatories should be more limited than depositions, particuiarly when the former represent an inexpensive means of securing useful information. See *Hoffman* v. *Wilson Line, Inc.*, E.D.Pa. 1946, 9 Fed.Ruies Serv. 33.514, Case 2; *Brewster* v. *Technicolor, Inc.*, S.D.N.Y. 1941, 2 F.R.D. 186, 5 Fed.Ruies Serv. 33.319, Case 3; *Kingsway Press, Inc.* v. *Farrell Publishing Corp.*, S.D.N.Y. 1939, 30 F.Supp. 775. Under present Ruie 33 some courts have unnecessarily restricted the breadth of inquiry on various grounds. See *Auer* v. *Hershey Creamery Co.*, D.N.J. 1939, 2 Fed.Ruies Serv. 33.31, Case 2, 1 F.R.D. 14; *Tudor* v. *Leslie*, D.Mass. 1940, 1 F.R.D. 448, 4 Fed.Ruies Serv. 33.324, Case 1. Other courts have read into the rule the requirement that interrogation shouid be directed only towards "important facts", and have tended to fix a more or less arbitrary limit as to the number of interrogatories which could be asked in any case. See *Knox* v. *Alter*, W.D.Pa. 1942, 2 F.R.D. 337, 6 Fed.Rules Serv. 33.352, Case 1; *Byers Theaters, Inc.* v. *Murphy*, W.D.Va. 1940, 3 Fed.Ruies Serv. 33.31, Case 3, 1 F.R.D. 286; *Coca-Cola Co.* v. *Dixi-Cola Laboratories, Inc.*, D.Md. 1939, 30 F.Supp. 275. See also comment on these rcstrictions in Holtzoff, Instruments of Discovery Under Federal Rules of Civil Procedure, 1942, 41 Mich.L.Rev. 205, 216-217. Under amended Rule 33, the party interrogated is given the right to invoke such protective orders under Ruie 30(b) as are appropriate to the situation. At the same time, it is provided that the number of or number of sets of interrogatories to be served may not be limited arbitrarily or as a general policy to any particular number, but that a limit may be fixed only as justice requires to avoid annoyance, expense, embarrassment or oppression in individual cases. The party interrogated, therefore, must show the necessity for limitation on that basis. It will be noted that in accord with this change the last sentence of the present rule, restricting the sets of interrogatories to be served, has been stricken. In *J. Schoeneman, Inc.* v. *Brauer*, W.D.Mo. 1940, 1 F.R.D. 292, 3 Fed.Rules Serv. 33.31, Case 2, the court said: "Ruie 33 . . . has been interpreted . . . as being just as broad in its implications as in the case of depositions . . . It makes no difference therefore, how many interrogatories are propounded. If the inquiries are pertinent the opposing party cannot complain." To the same effect, see *Canuso* v. *City of Niagara Falls*, W.D.N.Y. 1945, 8 Fed.Rules Serv. 33.352, Case 1; *Hoffman* v. *Wilson Line, Inc.*, supra.

By virtue of express language in the added second paragraph of Ruie 33, as amended, any uncertainty as to the use of the answers to interrogatories is removed. The omission of a provision on this score in the original rule has caused some difficulty. See, e.g., *Bailey* v. *New England Mutual Life Ins. Co.*, S.D.Cal. 1940, 1 F.R.D. 494, 4 Fed.Rules Serv. 33.46, Case 1.

The second sentence of the second paragraph in Ruie 33, as amended, concerns the situation where a party wishes to serve interrogatories on a party after having taken his deposition, or vice versa. It has been held that an oral examination of a party, after the submission to him and answer of interrogatories, would be permitted. *Howard* v. *State Marine Corp.*, S.D.N.Y. 1940, 4 Fed.Rules Serv. 33.62, Case 1, 1 F.R.D. 499; *Stevens* v. *Minder Construction Co.*, S.D.N.Y. 1943, 3 F.R.D. 498, 7 Fed.Rules Serv. 30b.31, Case 2. But objections have becn sustaincd to interrogatories served after the oral deposition of a party had been taken. *McNally* v. *Simons*, S.D.N.Y. 1940, 3 Fed.Ruies Serv. 33.61, Case 1, 1 F.R.D. 254; *Currier* v. *Currier*, S.D.N.Y. 1942, 3 F.R.D. 21, 6 Fed.Rules Serv. 33.61, Case 1. Rule 33, as amended, permits either interrogatories after a deposition or a deposition after interrogatories. It may be quite desirable or necessary to elicit additional information by the inexpensive method of interrogatories where a deposition has already been taken. The party to be interrogated, however, may seek a protective order from the court under Ruie 30(b) where the additional deposition or interrogation works a hardship or injustice on the party from whom it is sought.

NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

Subdivision (a). The mechanics of the operation of Ruie 33 are substantially revised by the proposed amendment, with a view to reducing court intervention. There is general agreement that interrogatories spawn a greater percentage of objections and motions than any other discovery device. The Columbia Survey shows that, although half of the litigants resorted to depositions and about one-third used interrogatories, about 65 percent of the objections were made with respect to interrogatories and 26 percent related to depositions. See also Speek, The Use of Discovery in United States District Courts, 60 Yale L.J. 1132, 1144, 1151 (1951); Note, 36 Minn.L.Rev. 364, 379 (1952).

The procedures now provided in Rule 33 seem calculated to encourage objections and court motions. The time periods now allowed for responding to interrogatories—15 days for answers and 10 days for objections—are too short. The Columbia Survey shows that tardy response to interrogatories is common, virtually expected. The same was reported in Speek, *supra*, 60 Yale L.J. 1132, 1144. The time pressures tend to encourage objections as a means of gaining time to answer.

The time for objections is even shorter than for answers, and the party runs the risk that if he faiis to object in time he may have walved his objections. *E.g.*, *Cleminshaw* v. *Beech Aircraft Corp.*, 21 F.R.D. 300 (D.Del. 1957); see 4 Moore's Federal Practice, ¶33.27 2d ed. 1966); 2A Barron & Holtzoff, Federal Practice and Procedure 372-373 (Wright ed. 1961). It often seems easier to object than to seek an extension of time. Unlike Rules 30(d) and 37(a), Ruie 33 imposes no sanction of expenses on a party whose objections are clearly unjustified.

Rule 33 assures that the objections will lead directly to court, through its requirement that they be served with a notice of hearing. Although this procedure does preclude an out-of-court resolution of the dispute, the procedure tends to discourage informal negotiations. If answers are served and they are thought inadequate, the interrogating party may move under Ruie 37(a) for an order compelling adequate answers. There is no assurance that the hearing on objections and that on inadequate answers will be heard together.

The amendment improves the procedure of Rnle 33 in the following respects:

(1) The time allowed for response is increased to 30 days and this time period applies to both answers and objections, but a defendant need not respond in less than 45 days after service of the summons and complaint upon him. As is true under existing law, the responding party who believes that some parts or all of the interrogatories are objeetionable may choose to seek a protective order under new Rule 26(c) or may serve objeetions under this rule. Unless he applies for a protective order, he is required to serve answers or objections in response to the interrogatories, subject to the sanctions provided in Rule 37(d). Answers and objections are served together, so that a response to each interrogatory is encouraged, and any fallure to respond is easily noted.

(2) In view of the enlarged time permitted for response, it is no longer necessary to require leave of court for service of interrogatories. The purpose of this requirement—that defendant have time to obtain counsel before a response must be made—is adequately fulfilled by the requirement that interrogatories be served upon a party with or after serviee of the summons and complaint upon him.

Some would urge that the plaintiff nevertheless not be permitted to serve interrogatories with the complaint. They fear that a routine practice might be invited, whereby form interrogatories would accompany most complaints. More fundamentally, they feel that, since very general complaints are permitted in present-day pleading, it is fair that the defendant have a right to take the lead in serving interrogatories. (These views apply also to Rule 36.) The amendment of Rule 33 rejects these views, in favor of allowing both parties to go forward with discovery, each free to obtain the information he needs respecting the case.

(3) If objections are made, the burden is on the interrogating party to move under Rule 37(a) for a court order compelling answers, in the course of which the court will pass on the objections. The change in the burden of going forward does not alter the existing obligation of an objecting party to justify his objections. *E.g., Pressley* v. *Boehlke,* 33 F.R.D. 316 (W.D.N.C. 1963). If the discovering party asserts than an answer is incomplete or evasive, again he may look to Rule 37(a) for relief, and he should add this assertion to his motion to overrule objections. There is no requirement that the parties consult informally concerning their differences, but the new procedure should encourage consultation, and the court may by local rule require it.

The proposed changes are similar in approach to those adopted by California in 1961. See Calif.Code Civ.Proc. § 2030(a). The experience of the Los Angeles Superior Court is informally reported as showing that the California amendment resulted in a significant reduction in court motions concerning interrogatories. Rhode Island takes a similar approach. See R. 33, R.I.R.Civ.Proc. Official Draft, p. 74 (Boston Law Book Co.).

A change is made in subdivision (a) which is not related to the sequence of procedures. The restriction to "adverse" parties is eliminated. The courts have generally construed this restriction as precluding interrogatories unless an issue between the parties is disclosed by the pleadings—even though the parties may have conflicting interests. *E.g., Mozeika* v. *Kaufman Construction Co.,* 25 F.R.D. 233 (E.D.Pa. 1960) (plaintiff and third-party defendant); *Biddle* v. *Hutchinson,* 24 F.R.D. 256 (M.D.Pa. 1959) (codefendants). The resulting distinctions have often been highly technical. In *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964), the Supreme Court rejected a contention that examination under Rule 35 could be had only against an "opposing" party, as not in keeping "with the aims of a liberal, nontechnical application of the Federal Rules." 379 U.S. at 116. Eliminating the requirement of "adverse" parties from Rule 33 brings it into line with all other discovery rules.

A second change in subdivision (a) is the addition of the term "governmental agency" to the listing of organizations whose answers are to be made by any officer or agent of the organization. This does not involve any change in existing law. Compare the similar listing in Rule 30(b)(6).

The duty of a party to supplement his answers to interrogatories is governed by a new provision in Rule 26(e).

Subdivision (b). There are numerous and conflicting decisions on the question whether and to what extent interrogatories are limited to matters "of fact," or may elicit opinions, contentions, and legal conclusions. Compare, *e.g., Payer, Hewitt & Co.* v. *Bellanca Corp.,* 26 F.R.D. 219 (D.Del. 1960) (opinions bad); *Zinsky* v. *New York Central R.R.,* 36 F.R.D. 680 (N.D.Ohio 1964) (factual opinion or contention good, but legal theory bad); *United States* v. *Carter Products, Inc.,* 28 F.R.D. 373 (S.D.N.Y.1961) (factual contentions and legal theories bad) with *Taylor* v. *Sound Steamship Lines, Inc.,* 100 F.Supp. 388 (D.Conn. 1951) (opinions good), *Bynum* v. *United States,* 36 F.R.D. 14 (E.D.La. 1964) (contentions as to facts constituting negligence good). For lists of the many conflicting authorities, see 4 Moore's Federal Practice ¶33.17 (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* § 768 (Wright ed. 1961).

Rule 33 is amended to provide that an interrogatory is not objectionable merely because it calls for an opinion or contention that relates to fact or the application of law to fact. Efforts to draw sharp lines between facts and opinions have invariably been unsuccessful, and the clear trend of the cases is to permit "factual" opinions. As to requests for opinions or contentions that call for the application of law to fact, they can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery. See *Diversified Products Corp.* v. *Sports Center Co.,* 42 F.R.D. 3 (D.Md. 1967); Moore, *supra;* Field & McKusick, *Maine Civil Practice* § 26.18 (1959). On the other hand, under the new language interrogatories may not extend to issues of "pure law," *i.e.,* legal issues unrelated to the facts of the case. *Cf. United States* v. *Maryland & Va. Milk Producers Assn., Inc.,* 22 F.R.D. 300 (D.D.C. 1958).

Since interrogatories involving mixed questions of law and fact may create disputes between the parties which are best resolved after much or all of the other discovery has been completed, the court is expressly authorized to defer an answer. Likewise, the court may delay determination until pretrial conference, if it believes that the dispute is best resolved in the presence of the judge.

The principal question raised with respect to the cases permitting such interrogatories is whether they reintroduce undesirable aspects of the prior pleading practice, whereby parties were chained to misconceived contentions or theories, and ultimate determination on the merits was frustrated. See James, *The Revival of Bills of Particulars under the Federal Rules,* 71 Harv.L.Rev. 1473 (1958). But there are few if any instances in the recorded cases demonstrating that such frustration has occurred. The general rule governing the use of answers to interrogatories is that under ordinary circumstances they do not limit proof. See *e.g., McElroy* v. *United Air Lines, Inc.,* 21 F.R.D. 100 (W.D.Mo. 1967); *Pressley* v. *Boehlke,* 33 F.R.D. 316, 317 (W.D.N.C. 1963). Although in exceptional circumstances reliance on an answer may cause such prejudice that the court will hold the answering party bound to his answer, *e.g., Zielinski* v. *Philadelphia Piers, Inc.,* 139 F.Supp. 408 (E.D.Pa. 1956), the interrogating party will ordinarily not be entitled to rely on the unchanging character of the answers he receives and cannot base prejudice on such reliance. The rule does not affect the power of a court to permit withdrawal or amendment of answers to interrogatories.

The use of answers to interrogatories at trial is made subject to the rules of evidence. The provisions governing use of depositions, to which Rule 33 presently refers, are not entirely apposite to answers to interrogatories, since deposition practice contemplates that all parties will ordinarily participate through cross-examination. See 4 Moore's *Federal Practice* ¶33.29[1] (2 ed. 1966).

Certain provisions are deleted from subdivision (b) because they are fully covered by new Rule 26(c) providing for protective orders and Rules 26(a) and 26(d). The language of the subdivision is thus simplified without any change of substance.

Subdivision (c). This is a new subdivision, adopted from Calif.Code Civ.Proc. § 2030(c), relating especially to interrogatories which require a party to eugage in burdensome or expensive research into his own business records in order to give an answer. The subdivision gives the party an option to make the records available and place the burden of research on the party who seeks the information. "This provision, without undermining the liberal scope of interrogatory discovery, places the burden of discovery upon its potential benefitee," Louiseil, *Modern California Discovery,* 124–125 (1963), and alleviates a problem which in the past has troubled Federal courts. See Speck, The Use of Discovery in United States District Courts, 60 Yale L.J. 1132, 1142–1144 (1951). The interrogating party is protected against abusive use of this provision

through the requirement that the burden of ascertaining the answer be substantially the same for both sides. A respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records. At the same time, the respondent unable to invoke this subdivision does not on that account lose the protection available to him under new Rule 26(c) against oppressive or unduly burdensome or expensive interrogatories. And even when the respondent successfully invokes the subdivision, the court is not deprived of its usual power, in appropriate cases, to require that the interrogating party reimburse the respondent for the expense of assembling his records and making them intelligible.

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure

The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) Persons not parties

This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970.)

NOTES OF ADVISORY COMMITTEE ON RULES

In England orders are made for the inspection of documents, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 31, r.r. 14, et seq., or for the inspection of tangible property or for entry upon land, O. 50, r.3. Michigan provides for inspection of damaged property when such damage is the ground of the action. Mich.Court Rules Ann. (Searl, 1933) Rule 41, § 2.

Practically all states have statutes authorizing the court to order parties in possession or control of documents to permit other parties to inspect and copy them before trial. See Ragland, Discovery Before Trial (1932), Appendix, p. 267, setting out the statutes.

Compare former Equity Rule 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness) (fifth paragraph).

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. The changes in clauses (1) and (2) correlate the scope of inquiry permitted under Rule 34 with that provided in Rule 26(b), and thus remove any ambiguity created by the former differences in language. As stated in *Olson Transportation Co.* v. *Socony-Vacuum Oil Co.*, E.D.Wis. 1944, 8 Fed.Rules Serv. 34.41, Case 2, ". . . Rule 34 is a direct and simple method of discovery." At the same time the addition of the words following the term "parties" makes certain that the person in whose custody, possession, or control the evidence reposes may have the benefit of the applicable protective orders stated in Rule 30(b). This change should be considered in the light of the proposed expansion of Rule 30(b).

An objection has been made that the word "designated" in Rule 34 has been construed with undue strictness in some district court cases so as to require great and impracticable specificity in the description of documents, papers, books, etc., sought to be inspected. The Committee, however, believes that no amendment is needed, and that the proper meaning of "designated" as requiring specificity has already been delineated by the Supreme Court. See *Brown* v. *United States*, 1928, 276 U.S. 134, 143, 48 S.Ct. 288 ("The subpoena . . . specifies . . . with reasonable particularity the subjects to which the documents called for related."); *Consolidated Rendering Co.* v. *Vermont*, 1908, 207 U.S. 541, 543-544, 28 S.Ct. 178 ("We see no reason why all such books, papers and correspondence which related to the subject of inquiry, and were described with reasonable detail, should not be called for and the company directed to produce them. Otherwise, the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have.").

NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

Rule 34 is revised to accomplish the following major changes in the existing rule: (1) to eliminate the requirement of good cause; (2) to have the rule operate extrajudicially; (3) to include testing and sampling as well as inspecting or photographing tangible things; and (4) to make clear that the rule does not preclude an independent action for analogous discovery against persons not parties.

Subdivision (a). Good cause is eliminated because it has furnished an uncertain and erratic protection to the parties from whom production is sought and is

now rendered unnecessary by virtue of the more specific provisions added to Rule 26(b) relating to materials assembled in preparation for trial and to experts retained or consulted by parties.

The good cause requirement was originally inserted in Rule 34 as a general protective provision in the absence of experience with the specific problems that would arise thereunder. As the note to Rule 26(b)(3) on trial preparation materials makes clear, good cause has been applied differently to varying classes of documents, though not without confusion. It has often been said in court opinions that good cause requires a consideration of need for the materials and of alternative means of obtaining them, *i.e.*, something more than relevance and lack of privilege. But the overwhelming proportion of the cases in which the formula of good cause has been applied to require a special showing are those involving trial preparation. In practice, the courts have not treated documents as having a special immunity to discovery simply because of their being documents. Protection may be afforded to claims of privacy or secrecy or of undue burden or expense under what is now Rule 26(c) (previously Rule 30(b)). To be sure, an appraisal of "undue" burden inevitably entails consideration of the needs of the party seeking discovery. With special provisions added to govern trial preparation materials and experts, there is no longer any occasion to retain the requirement of good cause.

The revision of Rule 34 to have it operate extrajudicially, rather than by court order, is to a large extent a reflection of existing law office practice. The Columbia Survey shows that of the litigants seeking inspection of documents or things, only about 25 percent filed motions for court orders. This minor fraction nevertheless accounted for a significant number of motions. About half of these motions were uncontested and in almost all instances the party seeking production ultimately prevalled. Although an extrajudicial procedure will not drastically alter existing practice under Rule 34—it will conform to it in most cases—it has the potential of saving court time in a substantial though proportionately small number of cases tried annually.

The inclusion of testing and sampling of tangible things and objects or operations on land reflects a need frequently encountered by parties in preparation for trial. If the operation of a particular machine is the basis of a claim for negligent injury, it will often be necessary to test its operating parts or to sample and test the products it is producing. *Cf.* Mich.Gen.Ct.R. 310.1(1) (1963) (testing authorized).

The inclusive description of "documents" is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data. The burden thus placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden of expense, either by restricting discovery or requiring that the discovering party pay costs. Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, confidentially of nondiscoverable matters, and costs.

Subdivision (b). The procedure provided in Rule 34 is essentially the same as that in Rule 33, as amended, and the discussion in the note appended to that rule is relevant to Rule 34 as well. Problems peculiar to Rule 34 relate to the specific arrangements that must be worked out for inspection and related acts of copying, photographing, testing, or sampling. The rule provides that a request for inspection shall set forth the items to be inspected either by item or category, describing each with reasonable particularity, and shall specify a reasonable time, place, and manner of making the inspection.

Subdivision (c). Rule 34 as revised continues to apply only to parties. Comments from the bar make clear that in the preparation of cases for trial it is occasionally necessary to enter land or inspect large tangible things in the possession of a person not a party, and that some courts have dismissed independent actions in the nature of bills in equity for such discovery on the ground that Rule 34 is preemptive. While an ideal solution to this problem is to provide for discovery against persons not parties in Rule 34, both the jurisdictional and procedural problems are very complex. For the present, this subdivision makes clear that Rule 34 does not preclude independent actions for discovery against persons not parties.

CROSS REFERENCES

Consequences of failure to comply with order, see rule 37.

Perpetuation of testimony, order and examination, see rule 27.

Subpoena for production of documentary evidence, see rule 45.

Summary judgment, continuance to procure discovery opposing, see rule 56.

FORMS

Motion for production of documents, etc., see form 24, Appendix of Forms.

Rule 35. Physical and Mental Examination of Persons

(a) Order for examination

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of examining physician

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action

or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

(As amended Mar. 30, 1970, eff. July 1, 1970.)

NOTES OF ADVISORY COMMITTEE ON RULES

Physical examination of parties before trial is authorized by statute or rule in a number of states. See Ariz.Rev.Code Ann. (Struckmeyer, 1928) § 4468; Mich.Court Rules Ann. (Searl, 1933) Rule 41, § 2; 2 N.J.Comp.Stat. (1910), N.Y.C.P.A. (1937) § 306; 1 S.D.Comp.Laws (1929) § 2716A; 3 Wash.Rev.Stat.Ann. (Remington, 1932) § 1230-1.

Mental examination of parties is authorized in Iowa. Iowa Code (1935) ch. 491-F1. See McCash, The Evolution of the Doctrine of Discovery and Its Present Status in Iowa, 20 Ia.L.Rev. 68 (1934).

The constitutionality of legislation providing for physical examination of parties was sustained in *Lyon* v. *Manhattan Railway Co.*, 142 N.Y. 298, 37 N.E. 113 (1894), and *McGovern* v. *Hope*, 63 N.J.L. 76, 42 Atl. 830 (1899). In *Union Pacific Ry. Co.* v. *Botsford*, 141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734 (1891), it was held that the court could not order the physical examination of a party in the absence of statutory authority. But in *Camden and Suburban Ry. Co.* v. *Stetson*, 177 U.S. 172, 20 L.Ed. 617, 44 L.Ed. 721 (1900) where there was statutory authority for such examination, derived from a state statute made operative by the conformity act, the practice was sustained. Such authority is now found in the present rule made operative by the Act of June 19, 1934, ch. 651, U.S.C., Title 28, former § 723b (now § 2072) (Rules in actions at law; Supreme Court authorized to make) and former § 723c (now § 2072) (Unlon of equlty and action at law rules; power of Supreme Court).

NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

Subdivision (a). Rule 35(a) has hitherto provided only for an order requiring a party to submit to an examination. It is desirable to extend the rule to provide for an order against the party for examination of a person in his custody or under his legal control. As appears from the provisions of amended Rule 37(b)(2) and the comment under that rule, an order to "produce" the third person imposes only an obligation to use good faith efforts to produce the person.

The amendment will settle beyond doubt that a parent or guardian suing to recover for injuries to a minor may be ordered to produce the minor for examination. Further, the amendment expressly includes blood examination within the kinds of examinations that can be ordered under the rule. See *Beach* v. *Beach*, 114 F.2d 479 (D.C. Cir. 1940). Provisions similar to the amendment have been adopted in at least 10 States: Calif.Code Civ.Proc. § 2032; Ida.R.Civ.P. 35; Ill.S-H Ann. c. 110A, § 215; Md.R.P. 420; Mich.Gen.Ct.R. 311; Minn.R.Civ.P. 35; Mo.Vern.Ann.R.Civ.P. 60.01; N.Dak.R.Civ.P. 35; N.Y.C.P.L. § 3121; Wyo.R.Civ.P. 35.

The amendment makes no change in the requirements of Rule 35 that, before a court order may issue, the relevant physical or mental condition must be shown to be "in controversy" and "good cause" must be shown for the examination. Thus, the amendment has no effect on the recent decision of the Supreme Court in *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964), stressing the importance of these requirements and applying them to the facts of the case. The amendment makes no reference to employees of a party. Provisions relating to employees in the State statutes and rules cited above appear to have been virtually unused.

Subdivision (b)(1). This subdivision is amended to correct an imbalance in Rule 35(b)(1) as heretofore written. Under that text, a party causing a Rule 35(a) examination to be made is required to furnish to the party examined, on request, a copy of the examining physician's report. If he delivers this copy, he is in turn entitled to receive from the party examined reports of all examinations of the same condition previously or later made. But the rule has not in terms entitled the examined party to receive from the party causing the Rule 35(a) examination any reports of earlier examinations of the same condition to which the latter may have access. The amendment cures this defect. See La.Stat.Ann., Civ.Proc. art. 1495 (1960); Utah R.Civ.P.35(c).

The amendment specifies that the written report of the examining physician includes results of all tests made, such as results of X-rays and cardiograms. It also embodies changes required by the broadening of Rule 35(a) to take in persons who are not parties.

Subdivision (b)(3). This new subdivision removes any possible doubt that reports of examination may be obtained although no order for examination has been made under Rule 35(a). Examinations are very frequently made by agreement, and sometimes before the party examined has an attorney. The courts have uniformly ordered that reports be supplied, see 4 Moore's Federal Practice ¶35.06, n.1 (2d ed. 1966); 2A Barron & Holtzoff, Federal Practice and Procedure § 823, n. 22 (Wright ed. 1961), and it appears best to fill the technical gap in the present rule.

The subdivision also makes clear that reports of examining physicians are discoverable not only under Rule 35(b) but under other rules as well. To be sure, if the report is privileged, then discovery is not permissible under any rule other than Rule 35(b) and it is permissible under Rule 35(b) only if the party requests a copy of the report of examination made by the other party's doctor. *Sher* v. *De Haven*, 199 F.2d 777 (D.C. Cir. 1952), *cert. denied* 345 U.S. 936 (1953). But if the report is unprivileged and is subject to discovery under the provisions of rules other than Rule 35(b)—such as Rules 34 or 26(b)(3) or (4)—discovery should not depend upon whether the person examined demands a copy of the report. Although a few cases have suggested the contrary, *e.g.*, *Galloway* v. *National Dairy Products Corp.*, 24 F.R.D. 362 (E.D.Pa. 1959), the better considered district court decisions hold that Rule 35(b) is not preemptive. *E.g.*, *Leszynski* v. *Russ*, 29 F.R.D. 10, 12 (D.Md. 1961) and cases cited. The question was recently given full consideration in *Buffington* v. *Wood*, 351 F.2d 292 (3d Cir. 1965), holding that Rule 35(b) is not preemptive.

CROSS REFERENCES

Consequences of failure to submit to examination, see rule 37.

Perpetuation of testimony, order and examination, see rule 27.

Rule 36. Requests for Admission of Documents

(a) Request for admission

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the

action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of admission

Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970.)

NOTES OF ADVISORY COMMITTEE ON RULES

Compare similar rules: Former Equity Rule 58 (last paragraph, which provides for the admission of the execution and genuineness of documents); English Rules Under the Judicature Act (The Annual Practice, 1937) O. 32; Ill.Rev.Stat. (1937) ch. 110, § 182 and Rule 18 (Ill.Rev.Stat. (1937) ch. 110, § 259.18); 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, § 69; Mich.Court Rules Ann. (Searl, 1933) Rule 42; N.J.Comp.Stat. (2 Cum.Supp. 1911-1924) N.Y.C.P.A. (1937) §§ 322, 323; Wis.Stat. (1935) § 327.22.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. The first change in the first sentence of Rule 36(a) and the addition of the new second sentence, specifying when requests for admissions may be served, bring Rule 36 in line with amended Rules 26(a) and 33. There is no reason why these rules should not be treated alike. Other provisions of Rule 36(a) give the party whose admissions are requested adequate protection.

The second change in the first sentence of the rule [subdivision (a)] removes any uncertainty as to whether a party can be called upon to admit matters of fact other than those set forth in relevant documents described in and exhibited with the request. In *Smyth* v. *Kaufman*, C.C.A.2d, 1940, 114 F.2d 40, it was held that the word "therein", now stricken from the rule [said subdivision] referred to the request and that a matter of fact not related to any document could be presented to the other party for admission or denial. The rule of this case is now clearly stated.

The substitution of the word "served" for "delivered" in the third sentence of the amended rule [said subdivision] is in conformance with the use of the word "serve" elsewhere in the rule and generally throughout the rules. See also Notes to Rules 13(a) and 33 herein. The substitution [in said subdivision] of "shorter or longer" for "further" will enable a court to designate a lesser period than 10 days for answer. This conforms with a similar provision already contained in Rule 33.

The addition of clause (1) [in said subdivision] specifies the method by which a party may challenge the propriety of a request to admit. There has been considerable difference of judicial opinion as to the correct method, if any, available to secure relief from an allegedly improper request. See Commentary, Methods of Objecting to Notice to Admit, 1942, 5 Fed.Rules Serv. 835; *International Carbonic Engineering Co.* v. *Natural Carbonic Products, Inc.*, S.D.Cal. 1944, 57 F.Supp. 248. The changes in clause (1) are merely of a clarifying and conforming nature.

The first of the added last two sentences [in said subdivision] prevents an objection to a part of a request from holding up the answer, if any, to the remainder. See similar proposed change in Rule 33. The last sentence strengthens the rule by making the denial accurately reflect the party's position. It is taken, with necessary changes, from Rule 8(b).

NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be. The changes made in the rule are designed to serve these purposes more effectively. Certain disagreements in the courts about the proper scope of the rule are resolved. In addition, the procedural operation of the rule is brought into line with other discovery procedures, and the binding effect of an admission is clarified. See generally Finman, The Request for Ad-

missions in Federal Civil Procedure, 71 Yale L.J. 371 (1962).

Subdivision (a). As revised, the subdivision provides that a request may be made to admit any matter within the scope of Rule 26(b) that relate to statements or opinions of fact or of the application of law to fact. It thereby eliminates the requirement that the matters be "of fact." This change resolves conflicts in the court decisions as to whether a request to admit matters of "opinion" and matters involving "mixed law and fact" is proper under the rule. As to "opinion," compare, *e.g., Jackson Bluff Corp.* v. *Marcelle,* 20 F.R.D. 139 (E.D.N.Y. 1957); *California* v. *The S.S. Jules Fribourg,* 19 F.R.D. 432 (N.D.Calif. 1955), with *e.g., Photon, Inc.* v. *Harris Intertype, Inc.,* 28 F.R.D. 327 (D.Mass. 1961); *Hise* v. *Lockwood Grader Corp.,* 153 F.Supp 276 (D.Nebr. 1957). As to "mixed law and fact" the majority of courts sustain objections, *e.g., Minnesota Mining and Mfg. Co.* v. *Norton Co.,* 36 F.R.D. 1 (N.D.Ohio 1964), but *McSparran* v. *Hanigan,* 225 F.Supp. 628 (E.D.Pa. 1963) is to the contrary.

Not only is it difficult as a practical matter to separate "fact" from "opinion," see 4 Moore's Federal Practice ¶36.04 (2d ed. 1966); *cf.* 2A Barron & Holtzoff, Federal Practice and Procedure 317 (Wright ed. 1961), but an admission on a matter of opinion may facilitate proof or narrow the issues or both. An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues. For example, an admission that an employee acted in the scope of his employment may remove a major issue from the trial. In *McSparran* v. *Hanigan, supra,* plaintiff admitted that "the premises on which said accident occurred, were occupied or under the control" of one of the defendants, 225 F.Supp. at 636. This admission, involving law as well as fact, removed one of the issues from the lawsuit and thereby reduced the proof required at trial. The amended provision does not authorize requests for admissions of law unrelated to the facts of the case.

Requests for admission involving the application of law to fact may create disputes between the parties which are best resolved in the presence of the judge after much or all of the other discovery has been completed. Power is therefore expressly conferred upon the court to defer decision until a pretrial conference is held or until a designated time prior to trial. On the other hand, the court should not automatically defer decision; in many instances, the importance of the admission lies in enabling the requesting party to avoid the burdensome accumulation of proof prior to the pretrial conference.

Courts have also divided on whether an answering party may properly object to request for admission as to matters which that party regards as "in dispute." Compare, *e.g., Syracuse Broadcasting Corp.* v. *Newhouse,* 271 F.2d 910, 917 (2d Cir. 1959); *Driver* v. *Gindy Mfg. Corp.,* 24 F.R.D. 473 (E.D.Pa. 1959); with *e.g., McGonigle* v *Baxter,* 27 F.R.D. 504 (E.D.Pa. 1961); *Uniled States* v. *Ehbauer,* 13 F.R.D. 462 (W.D.Mo. 1952). The proper response in such cases is an answer. The very purpose of the request is to ascertain whether the answering party is prepared to admit or regards the matter as presenting a genuine issue for trial. In his answer, the party may deny, or he may give his reason for inability to admit or deny the existence of a genuine issue. The party runs no risk of sanctions if the matter is genuinely in issue, since Rule 37(c) provides a sanction of costs only when there are no good reasons for a failure to admit.

On the other hand, requests to admit may be so voluminous and so framed that the answering party finds the task of identifying what is in dispute and what is not unduly burdensome. If so, the responding party may obtain a protective order under Rule 26(c). Some of the decisions sustaining objections on "disputability" grounds could have been justified by the burdensome character of the requests. See, *e.g., Syracuse Broadcasting Corp.* v. *Newhouse, supra.*

Another sharp split of authority exists on the question whether a party may base his answer on lack of information or knowledge without seeking out additional information. One line of cases has held that a party may answer on the basis of such knowledge as he has at the time he answers. *E.g., Jackson Buff Corp.* v. *Marcelle,* 20 F.R.D. 139 (E.D.N.Y. 1957); *Sladek* v. *General Motors Corp.,* 16 F.R.D. 104 (S.D.Iowa 1954). A larger group of cases, supported by commentators, has taken the view that if the responding party lacks knowledge, he must inform himself in reasonable fashion. *E.g., Hise* v. *Lockwood Grader Corp.,* 153 F.Supp. 276 (D.Nebr. 1957); *E. H. Tate Co.* v. *Jiffy Enterprises, Inc.,* 16 F.R.D. 571 (E.D.Pa. 1954); Finman, *supra,* 71 Yale L.J. 371, 404-409; 4 Moore's Federal Practice ¶36.04 (2d ed. 1966); 2A Barron & Holtzoff, Federal Practice and Procedure 509 (Wright ed. 1961).

The rule as revised adopts the majority view, as in keeping with a basic principle of the discovery rules that a reasonable burden may be imposed on the parties when its discharge will facilitate preparation for trial and ease the trial process. It has been argued against this view that one side should not have the burden of "proving" the other side's case. The revised rule requires only that the answering party make reasonable inquiry and secure such knowledge and information as are readily obtainable by him. In most instances, the investigation will be necessary either to his own case or to preparation for rebuttal. Even when it is not, the information may be close enough at hand to be "readily obtainable." Rule 36 requires only that the party state that he has taken these steps. The sanction for failure of a party to inform himself before he answers lies in the award of costs after trial, as provided in Rule 37(c).

The requirement that the answer to a request for admission be sworn is deleted, in favor of a provision that the answer be signed by the party or by his attorney. The provisions of Rule 36 make it clear that admissions function very much as pleadings do. Thus, when a party admits in part and denies in part, his admission is for purposes of the pending action only and may not be used against him in any other proceeding. The broadening of the rule to encompass mixed questions of law and fact reinforces this feature. Rule 36 does not lack a sanction for false answers; Rule 37(c) furnishes an appropriate deterrent.

The existing language describing the available grounds for objection to a request for admission is eliminated as neither necessary nor helpful. The statement that objection may be made to any request, which is "improper" adds nothing to the provisions that the party serve an answer or objection addressed to each matter and that he state his reasons for any objection. None of the other discovery rules set forth grounds for objection, except so far as all are subject to the general provisions of Rule 26.

Changes are made in the sequence of procedures in Rule 36 so that they conform to the new procedures in Rules 33 and 34. The major changes are as follows:

(1) The normal time for response to a request for admissions is lengthened from 10 to 30 days, conforming more closely to prevailing practice. A defendant need not respond, however, in less than 45 days after service of the summons and complaint upon him. The court may lengthen or shorten the time when special situations require it.

(2) The present requirement that the plaintiff wait 10 days to serve requests without leave of court is eliminated. The revised provision accords with those in Rules 33 and 34.

(3) The requirement that the objecting party move automatically for a hearing on his objection is eliminated, and the burden is on the requesting party to move for an order. The change in the burden of going forward does not modify present law on burden of persuasion. The award of expenses incurred in relation to the motion is made subject to the comprehensive provisions of Rule 37(a)(4).

(4) A problem peculiar to Rule 36 arises if the responding party serves answers that are not in conformity with the requirements of the rule—for example,

a denial is not "specific," or the explanation of inability to admit or deny is not "in detail." Rule 36 now makes no provision for court scrutiny of such answers before trial, and it seems to contemplate that defective answers bring about admissions just as effectively as if no answer had been served. Some cases have so held. *E.g., Southern Ry. Co.* v. *Crosby,* 201 F.2d 878 (4th Cir. 1953); *United States* v. *Laney,* 96 F.Supp. 482 (E.D.S.C. 1951).

Giving a defective answer the automatic effect of an admission may cause unfair surprise. A responding party who purported to deny or to be unable to admit or deny will for the first time at trial confront the contention that he has made a binding admission. Since it is not always easy to know whether a denial is "specific" or an explanation is "in detail," neither party can know how the court will rule at trial and whether proof must be prepared. Some courts, therefore, have entertained motions to rule on defective answers. They have at times ordered that amended answers be served, when the defects were technical, and at other times have declared that the matter was admitted. *E.g., Woods* v. *Stewart,* 171 F.2d 544 (5th Cir. 1948); *SEC* v. *Kaye, Real & Co.,* 122 F.Supp. 639 (S.D.N.Y. 1954); *Seib's Hatcheries, Inc.* v. *Lindley,* 13 F.R.D. 113 (W.D.Ark. 1952). The rule as revised conforms to the latter practice.

Subdivision (b). The rule does not now indicate the extent to which a party is bound by his admission. Some courts view admissions as the equivalent of sworn testimony *E.g., Ark.-Tenn Distributing Corp.* v. *Breidt,* 209 F.2d 359 (3d Cir. 1954); *United States* v. *Lemons,* 125 F.Supp. 686 (W.D.Ark. 1954); 4 Moore's *Federal Practice* ¶36.08 (2d ed. 1966 Supp.). At least in some jurisdictions a party may rebut his own testimony, *e.g., Alamo* v. *Del Rosario,* 98 F.2d 328 (D.C.Cir. 1938), and by analogy an admission made pursuant to Rule 36 may likewise be thought rebuttable. The courts in *Ark-Tenn* and *Lemons, supra,* reasoned in this way, although the results reached may be supported on different grounds. In *McSparran* v. *Hanigan,* 225 F.Supp. 628, 636–637 (E.D.Pa. 1963), the court held that an admission is conclusively binding, though noting the confusion created by prior decisions.

The new provisions give an admission a conclusively binding effect, for purposes only of the pending action, unless the admission is withdrawn or amended. In form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party. Louisell, *Modern California Discovery* § 8.07 (1963); 2A Barron & Holtzoff, *Federal Practice and Procedure* § 838 (Wright ed. 1961). Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated. Field & McKusick, *Maine Civil Practice* § 36.4 (1959); Finman, *supra,* 71 Yale L.J. 371, 418–426; Comment, 56 Nw.U.L.Rev. 679, 682–683 (1961).

Provision is made for withdrawal or amendment of an admission. This provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice. *Cf. Moosman* v. *Joseph P. Blitz, Inc.,* 358 F.2d 686 (2d Cir. 1966).

CROSS REFERENCES

Expenses on refusal to admit, see rule 37.

Use of admissions on motions for summary judgment, see rule 56.

FORMS

Request for admission under this rule, see form 25, Appendix of Forms.

Rule 37. Failure To Make Discovery: Sanctions

(a) Motion for order compelling discovery

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for and order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or incomplete answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of expenses of motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order

(1) *Sanctions by court in district where deposition is taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including and order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on failure to admit

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Subpoena of person in foreign country

A subpoena may be issued as provided in Title 28 U.S.C. § 1783, under the circumstances and conditions therein stated.

(f) Expenses against United States

Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970.)

NOTES OF ADVISORY COMMITTEE ON RULES

The provisions of this rule authorizing orders establishing facts or excluding evidence or striking pleadings, or authorizing judgments of dismissal or default, for refusal to answer questions or permit inspection or otherwise make discovery, are in accord with *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530, 15 Ann.Cas. 645 (1909), which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in *Hovey* v. *Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897), for the mere purpose of punishing for contempt.

NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

Rule 37 provides generally for sanctions against parties or persons unjustifiably resisting discovery. Experience has brought to light a number of defects in the language of the rule as well as instances in which it is not serving the purposes for which it was designed. See Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Col.L.Rev. 480 (1958). In addition, changes being made in other discovery rules requiring conforming amendments to Rule 37.

Rule 37 sometimes refers to a "failure" to afford discovery and at other times to a "refusal" to do so. Taking note of this dual terminology, courts have imported into "refusal" a requirement of "wilfullness." See *Roth* v. *Paramount Pictures Corp.*, 8 F.R.D. 31 (W.D.Pa. 1948); *Campbell* v. *Johnson*, 101 F.Supp. 705, 707 (S.D.N.Y. 1951). In *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), the Supreme Court concluded that the rather random use of these two terms in Rule 37 showed no design to use them with consistently distinctive meanings, that "refused" in Rule 37(b)(2) meant simply a failure to comply, and that wilfullness was relevant only to the selection of sanctions, if any, to be imposed. Nevertheless, after the decision in *Societe*, the court in *Hinson* v. *Michigan Mutual Liability Co.*, 275 F.2d 537 (5th Cir. 1960) once

again ruled that "refusal" required wilfullness. Substitution of "failure" for "refusal" throughout Rule 37 should eliminate this confusion and bring the rule into harmony with the *Societe Internationale* decision. See Rosenberg, *supra*, 58 Col.L.Rev. 480, 489-490 (1958).

Subdivision (a). Rule 37(a) provides relief to a party seeking discovery against one who, with or without stated objections, fails to afford the discovery sought. It has always fully served this function in relation to depositions, but the amendments being made to Rules 33 and 34 give Rule 37(a) added scope and importance. Under existing Rule 33, a party objecting to interrogatories must make a motion for court hearing on his objections. The changes now made in Rules 33 and 37(a) make it clear that the interrogating party must move to compel answers, and the motion is provided for in Rule 37(a). Existing Rule 34, since it requires a court order prior to production of documents or things or permission to enter on land, has no relation to Rule 37(a). Amendments of Rules 34 and 37(a) create a procedure similar to that provided for Rule 33.

Subdivision (a)(1). This is a new provision making clear to which court a party may apply for an order compelling discovery. Existing Rule 37(a) refers only to the court in which the deposition is being taken; nevertheless, it has been held that the court where the action is pending has "inherent power" to compel a party deponent to answer. *Lincoln Laboratories, Inc.* v. *Savage Laboratories, Inc.*, 27 F.R.D. 476 (D.Del. 1961). In relation to Rule 33 interrogatories and Rule 34 requests for inspection, the court where the action is pending is the appropriate enforcing tribunal. The new provision eliminates the need to resort to inherent power by spelling out the respective roles of the court where the action is pendmg and the court where the deposition is taken. In some instances, two courts are available to a party seeking to compel answers from a party deponent. The party seeking discovery may choose the court to which he will apply, but the court has power to remit the party to the other court as a more appropriate forum.

Subdivision (a)(2). This subdivision contains the substance of existing provisions of Rule 37(a) authorizing motions to compel answers to questions put at depositions and to interrogatories. New provisions authorize motions for orders compelling designation under Rules 30(b)(6) and 31(a) and compelling inspection in accordance with a request made under Rule 34. If the court denies a motion, in whole or part, it may accompany the denlal with issuance of a protective order. Compare the converse provision in Rule 26(c).

Subdivision (a)(3). This new provision makes clear that an evasive or incomplete answer is to be considered, for purposes of subdivision (a), a failure to answer. The courts have consistently held that they have the power to compel adequate answers. *E.g., Cone Mills Corp.* v. *Joseph Bancroft & Sons Co.*, 33 F.R.D. 318 (D.Del. 1963). This power is recognized and incorporated into the rule.

Subdivision (a)(4). This subdivision amends the provisions for award of expenses, including reasonable attorney's fees, to the prevalling party or person when a motion is made for an order compelling discovery. At present, an award of expenses is made only if the losing party or person is found to have acted without substantial justification. The change requires that expenses be awarded unless the conduct of the losing party or person is found to have been substantially justified. The test of "substantial jnstification" remains, but the change in language is intended to encourage judges to be more alert to abuses occurring in the discovery process.

On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court. But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists. And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery.

The present provision of Rule 37(a) that the court shall require payment if it finds that the defeated party acted without "substantial justification" may appear adequate, but in fact it has been little used. Only a handful of reported cases include an award of expenses, and the Columbia Survey found that in only one instance out of about 50 motions decided under Rule 37(a) did the court award expenses. It appears that the courts do not utilize the most important available sanction to deter abusive resort to the judiciary.

The proposed change provides in effect that expenses should ordmarily be awarded unless a court finds that the losing party acted justifiably in carrying his point to court. At the same time, a necessary flexibility is maintained, since the court retains the power to find that other circumstances make an award of expenses unjust—as where the prevailing party also acted unjustifiably. The amendment does not significantly narrow the discretion of the court, but rather presses the court to address itself to abusive practices. The present provision that expenses may be imposed upon either the party or his attorney or both is unchanged. But it is not contemplated that expenses will be imposed upon the attorney merely because the party is indigent.

Subdivision (b). This subdivision deals with sanctions for failure to comply with a court order. The present captions for subsections (1) and (2) entitled, "Contempt" and "Other Consequences," respectively, are confusing. One of the consequences listed in (2) is the arrest of the party, representing the exercise of the contempt power. The contents of the subsections show that the first authorizes the sanction of contempt (and no other) by the court in which the deposition is taken, whereas the second subsection authorizes a variety of sanctions, includmg contempt, which may be imposed by the court in which the action is pending. The captions of the subsections are changed to deflect their contents.

The scope of Rule 37(b)(2) is broadened by extending it to include any order "to provide or permit discovery," including orders issued under Rules 37(a) and 35. Various rules authorize orders for discovery—*e.g.*, Rule 35 (b)(1), Rule 26(c) as revised. Rule 37(d). See Rosenberg, *supra*, 58 Col.L.Rev. 480, 484-486. Rule 37(b)(2) should provide comprehensively for enforcement of all these orders. *Cf. Societe Internationale* v. *Rogers*, 357 U.S. 197, 207 (1958). On the other hand, the reference to Rule 34 is deleted to conform to the changed procedure in that rule.

A new subsection (E) provides that sanctions which have been available against a party for failure to comply with an order under Rule 35(a) to submit to examination will now be available against him for his failure to comply with a Rule 35(a) order to produce a third person for examination, unless he shows that he is unable to produce the person. In this context, "unable" means in effect "unable in good faith." See *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958).

Subdivision (b)(2) is amplified to provide for payment of reasonable expenses caused by the failure to obey the order. Although Rules 37(b)(2) and 37(d) have been silent as to award of expenses, courts have nevertheless ordered them on occasion. *E.g., United Sheeplined Clothing Co.* v. *Arctic Fur Cap Corp.*, 165 F.Supp. 193 (S.D.N.Y.1958); *Austin Theatre, Inc.* v. *Warner Bros. Picture, Inc.*, 22 F.R.D. 302 (S.D.N.Y. 1958). The provision places the burden on the disobedient party to avoid expenses by showing that his failure is justified or that special circumstances make an award of expenses unjust. Allocating the burden in this way conforms to the changed provisions as to expenses in Rule 37(a), and is particularly appropriate when a court order is disobeyed.

An added reference to directors of a party is similar to a change made in subdivision (d) and is explained in the note to that subdivision. The added reference to persons designated by a party under Rules 30(b)(6) or

31(a) to testify on behalf of the party carries out the new procedure in those rules for taking a deposition of a corporation or other organization.

Subdivision (c). Rule 37(c) provides a sanction for the enforcement of Rule 36 dealing with requests for admission. Rule 36 provides the mechanism whereby a party may obtain from another party in appropriate instances either (1) and admission, or (2) a sworn and specific denial, or (3) a sworn statement "setting forth in detail the reasons why he cannot truthfully admit or deny." If the party obtains the second or third of these responses, in proper form, Rule 36 does not provide for a pretrial hearing on whether the response is warranted by the evidence thus far accumulated. Instead, Rule 37(c) is intended to provide posttrial relief in the form of a requirement that the party improperly refusing the admission pay the expenses of the other side in making the necessary proof at trial.

Rule 37(c), as now written, addresses itself in terms only to the sworn denial and is silent with respect to the statement of reasons for an inability to admit or deny. There is no apparent basis for this distinction, since the sanction provided in Rule 37(c) should deter all unjustified failures to admit. This omission in the rule has caused confused and diverse treatment in the courts. One court has held that if a party gives inadequate reasons, he should be treated before trial as having denied the request, so that Rule 37(c) may apply. *Bertha Bldg. Corp.* v. *National Theatres Corp.*, 15 F.R.D. 339 (E.D.N.Y. 1954). Another has held that the party should be treated as having admitted the request. *Heng Hsin Co.* v. *Stern, Morgenthau & Co.*, 20 Fed.Rules Serv. 36a.52, Case 1 (S.D.N.Y. Dec. 10, 1954). Still another has ordered a new response, without indicating what the outcome should be if the new response were inadequate. *United States Plywood Corp.* v. *Hudson Lumber Co.*, 127 F.Supp. 489, 497-498 (S.D.N.Y. 1954). See generally Finman, *The Request for Admissions in Federal Civil Procedure*, 71 Yale L.J. 371, 426-430 (1962). The amendment eliminates this defect in Rule 37(c) by bringing within its scope all failures to admit.

Additional provisions in Rule 37(c) protect a party from having to pay expenses if the request for admission was held objectionable under Rule 36(a) or if the party failing to admit had reasonable ground to believe that he might prevail on the matter. The latter provision emphasizes that the true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted reasonably in believing that he might prevail.

Subdivision (d). The scope of subdivision (d) is broadened to include responses to requests for inspection under Rule 34, thereby conforming to the new procedures of Rule 34.

Two related changes are made in subdivision (d): the permissible sanctions are broadened to include such orders "as are just"; and the requirement that the failure to appear or respond be "wilful" is eliminated. Although Rule 37(d) in terms provides for only three sanctions, all rather severe, the courts have interpreted it as permitting softer sanctions than those which it sets forth. *E.g., Gill* v. *Stolow*, 240 F.2d 669 (2d Cir. 1957); *Saltzman* v. *Birrell*, 156 F.Supp. 538 (S.D.N.Y. 1957); 2A Barron & Holtzoff, *Federal Practice and Procedure* 554-557 (Wright ed. 1961). The rule is changed to provide the greater flexibility as to sanctions which the cases show is needed

The resulting flexibility as to sanctions eliminates any need to retain the requirement that the failure to appear or respond be "wilful." The concept of "wilful failure" is at best subtle and difficnlt, and the cases do not supply a bright line. Many courts have imposed sanctions without referring to wilfuliness. *E.g., Milewski* v. *Schneider Transportation Co.*, 238 F.2d 397 (6th Cir. 1956); *Dictograph Products, Inc.* v. *Kentworth Corp.*, 7 F.R.D. 543 (W.D.Ky. 1947). In addition, in view of the possibility of light sanctions, even a negligent failure should come within Rule 37(d). If default is caused by counsel's ignorance of Federal practice, cf. *Dunn.* v. *Pa. R.R.*, 96 F. Supp. 597 (N.D.Ohio 1951), or by his preoccupation with another aspect of the case, *cf. Maurer-Neuer, Inc.* v. *United Packinghouse Workers*, 26 F.R.D. 139 (D.Kans. 1960), dismissal of the action and default judgment are not justified, but the imposition of expenses and fees may well be. "Wilfullness" continues to play a role, along with various other factors, in the choice of sanctions. Thus, the scheme conforms to Rule 37(b) as construed by the Supreme Court in *Societe Internationale* v. *Rogers*, 357 U.S. 197, 208 (1958).

A provision is added to make clear that a party may not properly remain completely silent even when he regards a notice to take his deposition or a set of interrogatories or requests to inspect as improper and objectionable. If he desires not to appear or not to respond, he must apply for a protective order. The cases are divided on whether a protective order must be sought. Compare *Collins* v. *Wayland*, 139 F.2d 677 (9th Cir. 1944), *cert. den.* 322 U.S. 744; *Bourgeois* v. *El Paso Natural Gas Co.*, 20 F.R.D. 358 (S.D.N.Y. 1957); *Loosly* v. *Stone*, 15 F.R.D. 373 (S.D.Ill. 1954), with *Scarlatos* v. *Kulukundis*, 21 F.R.D. 185 (S.D.N.Y. 1957); *Ross* v. *True Temper Corp.*, 11 F.R.D 307 (N.D.Ohio 1951). Compare also Rosenberg, *supra*, 58 Col.L.Rev. 480, 496 (1958) with 2A Barron & Holtzoff, Federal Practice and Procedure 530-531 (Wright ed. 1961). The party from whom discovery is sought is afforded, through Rule 26(c), a fair and effective procedure whereby he can challenge the request made. At the same time, the total non-compliance with which Rule 37(d) is concerned may impose severe inconvenience or hardship on the discovering party and substantially delay the discovery process. *Cf.* 2B Barron & Holtzoff, Federal Practice and Procedure 306-307 (Wright ed. 1961) (response to a subpoena).

The failure of an officer or managing agent of a party to make discovery as required by present Rule 37(d) is treated as the failure of the party. The rule as revised provides similar treatment for a director of a party. There is slight warrant for the present distinction between officers and managing agents on the one hand and directors on the other. Although the legal power over a director to compel his making discovery may not be as great as over officers or managing agents, *Campbell* v. *General Motors Corp.*, 13 F.R.D. 331 (S.D.N.Y. 1952), the practical differences are negligible. That a director's interests are normally aligned with those of his corporation is shown by the provisions of old Rule 26(d)(2), transferred to 32(a)(2) (deposition of director of party may be used at trial by an adverse party for any purpose) and of Rule 43(b) (director of party may be treated at trial as a hostile witness on direct examination by any adverse party). Moreover, in those rare instances when a corporation is unable through good faith efforts to compel a director to make discovery, it is unlikely that the court will impose sanctions. *Cf. Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958).

Subdivision (e). The change in the caption conforms to the language of 28 U.S.C. § 1783, as amended in 1964.

Subdivision (f). Until recently, costs of a civil action could be awarded against the United States only when expressly provided by Act of Congress, and such provision was rarely made. See H.R.Rept.No. 1535, 89th Cong., 2d Sess., 2-3 (1966). To avoid any conflict with this doctrine, Rule 37(f) has provided that expenses and attorney's fees may not be imposed upon the United States under Rule 37. See 2A Barron & Holtzoff, *Federal Practice and Procedure* 857 (Wright ed. 1961).

A major change in the law was made in 1966, 80 Stat. 308, 28 U.S.C. § 2412 (1966), whereby a judgment for costs may ordinarily be awarded to the prevailing party in any civil action brought by or against the United States. Costs are not to include the fees and expenses of attorneys. In light of this legislative development, Rule 37(f) is amended to permit the award of expenses and fees against the United States under Rule 37, but only to the extent permitted by statute.

The amendment brings Rule 37(f) into line with present and future statutory provisions.

AMENDMENTS

1948—The amendment effective October 1949, substituted the reference to "Title 28, U.S.C., § 1783" in subdivision (e) for the reference to "the act of July 3, 1926, ch. 762, § 1 (44 Stat. 835), U.S.C., Title 28, § 711".

CROSS REFERENCES

Failure to attend taking of a deposition or to serve subpoena, payment of expenses, see rule 30.

TITLE VI—TRIALS

Rule 38. Jury Trial of Right

(a) Right preserved

The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand

Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of issues

In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver

The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(e) Admiralty and maritime claims

These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule provides for the preservation of the constitutional right of trial by jury as directed in the enabling act (act of June 19, 1934, 48 Stat. 1064, U.S.C., Title 28, former § 723c (now § 2072)), and it and the next rule make definite provision for claim and waiver of jury trial, following the method used in many American states and in England and the British Dominions. Thus the claim must be made at once on initial pleading or appearance under Ill.Rev.Stat. (1937) ch. 110, § 188; 6 Tenn.Code Ann. (Williams, 1934) § 8734; compare Wyo.Rev.Stat.Ann. (1931) § 89-1320 (with answer or reply); within 10 days after the pleadings are completed or the case is at issue under 2 Conn.Gen.Stat. (1930) § 5624; Hawaii Rev.Laws (1935) § 4101; 2 Mass.Gen.Laws (Ter.Ed. 1932) ch. 231, § 60; 3 Mich.Comp.Laws (1929) § 14263; Mich.Court Rules Ann. (Searl, 1933) Rule 33 (15 days); England (until 1933) O. 36, r.r. 2 and 6; and Ontario Jud.Act (1927) § 57(1) (4 days, or, where prior notice of trial, 2 days from such notice); or at a definite time varying under different codes, from 10 days before notice of trial to 10 days after notice, or, as in many, when the case is called for assignment, Ariz.Rev.Code Ann. (Struckmeyer, 1928) § 3802; Calif.Code Civ.Proc. (Deering, 1937) § 631, par. 4; Iowa Code (1935) § 10724; 4 Nev.Comp.Laws (Hillyer, 1929) § 8782; N.M.Stat.Ann. (Courtright, 1929) § 105-814; N.Y.C.P.A. (1937) § 426, subdivision 5 (applying to New York, Bronx, Richmond, Kings, and Queens Counties); R.I.Pub.Laws (1929), ch. 1327, amending R.I.Gen.Laws (1923) ch. 337, § 6; Utah Rev.Stat.Ann. (1933) § 104-23-6; 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 316; England (4 days after notice of trial), Administration of Justice Act (1933) § 6 and amended rule under the Judicature Act (The Annual Practice, 1937), O. 36, r. 1; Australia High Court Procedure Act (1921) § 12, Rules, O. 33, r. 2; Alberta Rules of Ct. (1914) 172, 183, 184; British Columbia Sup.Ct.Rules (1925) O. 36, r.r. 2, 6, 11, and 16; New Brunswick Jud. Act (1927) O. 36, r.r. 2 and 5. See James, Trial by Jury and the New Federal Rules of Procedure (1936), 45 Yale L.J. 1022.

Rule 81(c) provides for claim for jury trial in removed actions.

The right to trial by jury as declared in U.S.C., Title 28, formerly § 770 (now § 1873) (Trial of issues of fact; by jury; exceptions), and similar statutes, is unaffected by this rule. This rule modifies U.S.C., Title 28, former § 773 (Trial of issues of fact; by court).

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

See Note to Rule 9(h), supra.

CROSS REFERENCES

Admiralty and maritime case, trial of issues of fact by jury, see section 1873 of this title.

Advisory jury, see rule 39.

Calendar to designate cases as "jury actions", see rule 79.

Declaratory judgment actions, right to jury trial, see rule 57.

Default judgment, right of trial by jury, see rule 55.

Directed verdict, motion for which is not granted not a waiver of trial by jury, see rule 50.

Juries generally, see chapter 121 of this title.

Recovery of forfeitures in actions on bonds and specialties, jury assessment of amount due, see section 1874 of this title.

Removed actions, time for service of jury demand, see rule 81.

Supreme Court, jury trial in original actions at law, see section 1872 of this title.

Trial by jury or by the court, see rule 39.

Trustees and receivers, right to jury trial in actions against, see section 959 of this title.

United States, jury trial denied in actions against, see section 2402 of this title.

Rule 39. Trial by Jury or by the Court

(a) By jury

When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

(b) By the court

Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) Advisory jury and trial by consent

In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

NOTES OF ADVISORY COMMITTEE ON RULES

The provisions for express waiver of jury trial found in U.S.C., Title 28, former § 773 (Trial of issues of fact; by court) are incorporated in this rule. See rule 38, however, which extends the provisions for waiver of jury. U.S.C., Title 28, former § 772 (Trial of issues of fact; in equity in patent causes) is unaffected by this rule. When certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried. See *Liberty Oil Co.* v. *Condon Nat. Bank*, 260 U.S. 235, 43 S. Ct. 118, 67 L. Ed. 232 (1922).

A discretionary power in the courts to send issues of fact to the jury is common in state procedure. Compare Calif.Code Civ.Proc. (Deering, 1937) § 592; 1 Colo.Stat.Ann. (1935) Code Civ.Proc., ch. 12, § 191; Conn.Gen.Stat. (1930) § 5625; 2 Minn.Stat. (Mason, 1927) § 9288; 4 Mont.Rev.Codes Ann. (1935) § 9327; N.Y.C.P.A. (1937) § 430; 2 Ohio Gen.Code Ann. (Page, 1926) § 11380; 1 Okla.Stat.Ann. (Harlow, 1931) § 351; Utah Rev.Stat.Ann. (1933) § 104-23-5; 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 315; Wis.Stat. (1935) § 270.07. See Equity Rule 23 (Matters Ordinarily Determinable at Law When Arising in Suit in Equity to be Disposed of Therein) and U.S.C., Title 28, former § 772 (Trial of issues of fact; in equity in patent causes); *Colleton Merc. Mfg. Co.* v. *Savannah River Lumber Co.*, 280 Fed. 358 (C.C.A.4th, 1922); *Fed. Res. Bk. of San Francisco* v. *Idaho Grimm Alfalfa Seed Growers' Ass'n*, 8 F.2d 922 (C.C.A.9th, 1925), cert. den. 270 U.S. 646, 46 S.Ct. 347, 70 L.Ed. 778 (1926); *Watt* v. *Starke*, 101 U.S. 247, 25 L.Ed. 826 (1879).

CROSS REFERENCES

Demand for jury trial, see rule 38.

Enlargement of time after expiration of period prescribed, see rule 6.

Findings of fact required in actions tried with an advisory jury, see rule 52.

Report of masters in jury actions, see rule 53.

Rule 40. Assignment of Cases for Trial

The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.

NOTES OF ADVISORY COMMITTEE ON RULES

U.S.C., Title 28, former § 769 (Notice of case for trial) is modified. See former Equity Rule 56 (On Expiration of Time for Depositions, Case Goes on Trial Calendar). See also former Equity Rule 57 (Continuances).

For examples of statutes giving precedence, see U.S.C., Title 28, formerly § 47 (now §§ 1253, 2101, 2325) (Injunctions as to orders of Interstate Commerce Commission); formerly § 380 (now §§ 1253, 2101, 2284) (Injunctions alleged unconstitutionality of state statutes); formerly § 380a (now §§ 1253, 2101, 2284) (Same; Constitutionality of federal statute); former § 768 (Priority of cases where a state is party); Title 15, § 28 (Antitrust laws; suits against monopolies expedited); Title 22, § 240 (Petition for restoration of property seized as munitions of war, etc.); and Title 49, § 44 (Proceedings in equity under interstate commerce laws; expedition of suits).

CROSS REFERENCES

Adoption of local rules not inconsistent with these rules, see rule 83.

Rule 41. Dismissal of Actions

(a) Voluntary dismissal: effect thereof

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary dismissal: effect thereof

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction,

for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of counterclaim, cross-claim, or third-party claim

The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of previously-dismissed action

If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). Compare Ill.Rev.Stat. (1937) ch. 110, § 176, and English Rules Under the Judicature Act (The Annual Practice, 1937) O. 26.

Provisions regarding dismissal in such statutes as U.S.C., Title 8, § 164 (Jurisdiction of district courts in immigration cases) and U.S.C., Title 31, § 232 (Liability of persons making false claims against United States; suits) are preserved by paragraph (1).

Note to Subdivision (b). This provides for the equivalent of a nonsult on motion by the defendant after the completion of the presentation of evidence by the plaintiff. Also, for actions tried without a jury, it provides the equivalent of the directed verdict practice for jury actions which is regulated by Rule 50.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. Subdivision (a). The insertion of the reference to Rule 66 correlates Rule 41(a)(1) with the express provisions concerning dismissal set forth in amended Rule 66 on receivers.

The change in Rule 41(a)(1)(i) gives the service of a motion for summary judgment by the adverse party the same effect in preventing unlimited dismissal as was originally given only to the service of an answer. The omission of reference to a motion for summary judgment in the original rule was subject to criticism. 3 Moore's Federal Practice, 1938, 3037-3038, n. 12. A motion for summary judgment may be forthcoming prior to answer, and if well taken will eliminate the necessity for an answer. Since such a motion may require even more research and preparation than the answer itself, there is good reason why the service of the motion, like that of the answer, should prevent a voluntary dismissal by the adversary without court approval.

The word "generally" has been stricken from Rule 41(a)(1)(ii) in order to avoid confusion and to conform with the elimination of the necessity for special appearance by original Rule 12(b).

Subdivision (b). In some cases tried without a jury, where at the close of plaintiff's evidence the defendant moves for dismissal under Rule 41(b) on the ground that plaintiff's evidence is insufficient for recovery, the plaintiff's own evidence may be conflicting or present questions of credibility. In ruling on the defendant's motion, questions arise as to the function of the judge in evaluating the testimony and whether findings should be made if the motion is sustained. Three circuits hold that as the judge is the trier of the facts in such a situation his function is not the same as on a motion to direct a verdict, where the jury is the trier of the facts, and that the judge in deciding such a motion in a non-jury case may pass on conflicts of evidence and credibility, and if he performs that function of evaluating the testimony and grants the motion on the merits, findings are required. *Young* v. *United States*, C.C.A.9th, 1940, 111 F.2d 823; *Gary Theatre Co.* v. *Columbia Pictures Corporation*, C.C.A.7th, 1941, 120 F.2d 891; *Bach* v. *Friden Calculating Machine Co., Inc.*, C.C.A.6th, 1945, 148 F.2d 407. Cf. *Mateas* v. *Fred Harvey, a Corporation*, C.C.A.9th, 1945, 146 F.2d 989. The Third Circuit has held that on such a motion the function of the court is the same as on a motion to direct in a jury case, and that the court should only decide whether there is evidence which would support a judgment for the plaintiff, and, therefore, findings are not required by Rule 52. *Federal Deposit Insurance Corp.* v. *Mason*, C.C.A.3d, 1940, 115 F.2d 548; *Schad* v. *Twentieth Century-Fox Film Corp.*, C.C.A.3d, 1943, 136 F.2d 991. The added sentence in Rule 41(b) incorporates the view of the Sixth, Seventh and Ninth Circuits. See also 3 Moore's Federal Practice, 1938, Cum. Supplement § 41.03, under "Page 3045"; Commentary, The Motion to Dismiss in Non-Jury Cases, 1946, 9 Fed.Rules Serv., Comm.Pg. 41b.14.

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

Under the present text of the second sentence of this subdivision, the motion for dismissal at the close of the plaintiff's evidence may be made in a case tried to a jury as well as in a case tried without a jury. But, when made in a jury-tried case, this motion overlaps the motion for a directed verdict under Rule 50(a), which is also available in the same situation. It has been held that the standard to be applied in deciding the Rule 41(b) motion at the close of the plaintiff's evidence in a jury-tried case is the same as that used upon a motion for a directed verdict made at the same stage; and, just as the court need not make findings pursuant to Rule 52(a) when it directs a verdict, so in a jury-tried case it may omit these findings in granting the Rule 41(b) motion. See generally *O'Brien* v. *Westinghouse Electric Corp.*, 293 F.2d 1, 5-10 (3d Cir. 1961).

As indicated by the discussion in the *O'Brien* case, the overlap has caused confusion. Accordingly, the second and third sentences of Rule 41(b) are amended to provide that the motion for dismissal at the close of the plaintiff's evidence shall apply only to nonjury cases (including cases tried with an advisory jury). Hereafter the correct motion in jury-tried cases will be the motion for a directed verdict. This involves no change of substance. It should be noted that the court upon a motion for a directed verdict may in appropriate circumstances deny that motion and grant instead a new trial, or a voluntary dismissal without prejudice under Rule 41(a)(2). See 6 Moore's Federal Practice § 59.08[5] (2d ed. 1954); cf. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217, 67 S.Ct. 752, 91 L.Ed. 849 (1947).

The first sentence of Rule 41(b), providing for dismissal for failure to prosecute or to comply with the Rules or any order of court, and the general provisions of the last sentence remain applicable in jury as well as nonjury cases.

The amendment of the last sentence of Rule 41(b) indicates that a dismissal for lack of an indispensable party does not operate as an adjudication on the merits. Such a dismissal does not bar a new action, for it is based merely "on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim." See *Costello* v. *United States*, 365 U.S. 265, 284-288, 81 S.Ct. 534, 5 L.Ed.2d 551 & n. 5 (1961); *Mallow* v. *Hinde*, 12 Wheat. (25 U.S.) 193, 6 L.Ed. 599 (1827); Clark, *Code Pleading* 602 (2d ed. 1947); Restatement of Judgments § 49, comm. a, b (1942). This amendment corrects an omission from the rule and is consistent

with an earlier amendment, effective in 1948, adding "the defense of failure to join an indispensable party" to clause (1) of Rule 12(h).

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

The terminology is changed to accord with the amendment of Rule 19. See that amended rule and the Advisory Committee's Note thereto.

NOTES OF ADVISORY COMMITTEE ON 1968 AMENDMENT TO RULES

The amendment corrects an inadvertent error in the reference to amended Rule 23.

CROSS REFERENCES

Approval of court for dismissal of class action, see rule 23.
Costs, see rule 54.
Counterclaim, cross-claim or third party claim, see rules 13 and 14.
Discontinuance of civil actions arising under immigration laws, see section 1329 of Title 8, Aliens and Nationality.
Findings of fact in non-jury action, see rule 52.
Motion for directed verdict at close of evidence offered by an opponent, see rule 50.
Motion to dismiss—
For failure to state a claim upon which relief can be granted, see rule 12.
For lack of jurisdiction or improper venue, see rule 12.
Order of court for dismissal of action wherein receiver has been appointed, see rule 66.
Taxation of costs, see section 1920 of this title.
Withdrawal or discontinuance of false claim actions against United States, see section 232 of Title 31, Money and Finance.

Rule 42. Consolidation; Separate Trials

(a) Consolidation

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate trials

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Subdivision (a) is based upon U.S.C., Title 28, former § 734 (Orders to save costs; consolidation of causes of like nature) but insofar as the statute differs from this rule, it is modified.

For comparable statutes dealing with consolidation see Ark.Dig.Stat. (Crawford & Moses, 1921) § 1081; Calif.Code Civ.Proc. (Deering, 1937) § 1048; N.M.Stat.Ann. (Courtright, 1929) § 105-828; N.Y.C.P.A. (1937) §§ 96, 96a, and 97; American Judicature Society, Bulletin XIV (1919) Art.26.

For severance or separate trials see Calif.Code Civ.Proc. (Deering, 1937) § 1048; N.Y.C.P.A. (1937) § 96; American Judicature Society, Bulletin XIV (1919) Art. 3, § 2 and Art. 10, § 10. See also the third sentence of Equity Ruie 29 (Defenses—How Presented) providing for discretionary separate hearing and disposition before trial of pleas in bar or abatement, and see also Rule 12(d) of these rules for preliminary hearings of defenses and objections.

For the entry of separate judgments, see Rule 54(b) (Judgment at Various Stages).

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

In certain suits in admiralty separation for trial of the issues of liability and damages (or of the extent of liability other than damages, such as salvage and general average) has been conducive to expedition and economy, especially because of the statutory right to interlocutory appeal in admiralty cases (which is of course preserved by these Ruies). While separation of issues for trial is not to be routinely ordered, it is important that it be encouraged where experience has demonstrated its worth. Cf. Weinstein, Routine Bifurcation of Negligence Trials, 14 Vand.L.Rev. 831 (1961).

In cases (including some cases within the admiralty and maritime jurisdiction) in which the parties have a constitutional or statutory right of trial by jury, separation of issues may give rise to problems. See *e.g., United Air Lines, Inc.* v. *Wiener*, 286 F.2d 302 (9th Cir. 1961). Accordingly, the proposed change in Rule 42 reiterates the mandate of Rule 38 respecting preservation of the right to jury trial.

CROSS REFERENCES

Preliminary hearings of defenses and objections, see rule 12.
Separate—
Judgments, see rule 54.
Trial for parties, see rule 20.
Trials of counterclaims or cross-claims, see rule 13.
Third party claims, see rule 14.

Rule 43. Taking of Testimony

(a) Form

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

[(b), (c) Abrogated]

(d) Affirmation in lieu of oath

Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) Evidence on motions

When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(f) Interpreters

The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

(As amended Feb. 28, 1966, eff. July 1, 1966; Nov. 20, 1972; Dec. 18, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). The first sentence is a restatement of the substance of U.S.C., Title 28, former

§ 635 (Proof in common-law actions), formerly § 637 (now §§ 2072, 2073) (Proof in equity and admiralty), and former Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). This rule abolishes in patent and trade-mark actions, the practice under former Equity Rule 48 of setting forth in affidavits the testimony in chief of expert witnesses whose testimony is directed to matters of opinion. The second and third sentences on admissibility of evidence and *Subdivision* (*b*) on contradiction and cross-examination modify U.S.C., Title 28, formerly § 725 (now § 1652) (Laws of states as rules of decision) insofar as that statute has been construed to prescribe conformity to state rules of evidence. Compare Callihan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 Yale L.J. 622 (1936), and *Same: 2*, 47 Yale L.J. 195 (1937). The last sentence modifies to the extent indicated U.S.C., Title 28, § 631 (Competency of witnesses governed by State laws).

Note to Subdivision (*b*). See 4 Wigmore on Evidence (2d ed., 1923) § 1885 *et seq.*

Note to Subdivision (*c*). See former Equlty Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). With the last sentence compare *Dowagiac* v. *Lochren*, 143 Fed. 211 (C.C.A.8th, 1906). See also *Blease* v. *Garlington*, 92 U.S. 1, 23 L.Ed. 521 (1876); *Nelson* v. *United States*, 201 U.S. 92. 114, 26 S.Ct. 358, 50 L.Ed. 673 (1906); *Unkle* v. *Wills*, 281 Fed. 29 (C.C.A.8th 1922).

See Rule 61 for harmless error in either the admission or exclusion of evidence.

Note to Subdivision (*d*). See former Equity Ruie 78 (Affirmation in Lieu of Oath) and U.S.C., Title 1, § 1 (Words importing singular number, masculine gender, etc.; extended application), providing for affirmation in lieu of oath.

Supplementary Note of Advisory Committee Regarding Rules 43 and 44

Note. These rules have becn criticized and suggested improvements offered by commentators. I Wigmore on Evidence, 3d ed. 1940, 200-204; Green, The Admissibility of Evidence Under the Federal Ruies, 1941, 55 Harv.L.Rev. 197. Cases indicate, however, that the rule is working better than these commentators had expected. *Boerner* v. *United States*, C.C.A.2d, 1941, 117 F.2d 387, cert. den., 1941, 313 U.S. 587, 61 S.Ct. 1120; *Mosson* v. *Liberty Fast Freight Co.*, C.C.A.2d, 1942, 124 F.2d 448; *Hartford Accident & Indemnity Co.* v. *Olivier*, C.C.A.5th, 1941, 123 F.2d 709; *Anzano* v. *Metropolitan Life Ins. Co. of New York*, C.C.A.3d, 1941, 118 F.2d 430; *Franzen* v. *E. I. DuPont De Nemours & Co.*, C.C.A.3d, 1944, 146 F.2d 837; *Fakouri* v. *Cadais*, C.C.A.5th, 1945, 147 F.2d 667; *In re C. & P. Co.*, S.D.Cal. 1945, 63 F.Supp. 400, 408. But cf. *United States* v. *Aluminum Co. of America*, S.D.N.Y. 1938, 1 Fed.Ruies Serv. 43a.3, Case 1; Note, 1946, 46 Col.L.Rev. 267. Whlle consideration of a comprehensive and detalled set of rules of evidence seems very desirable, it has not been feasible for the Committee so far to undertake this important task. Such consideration should include the adaptability to federal practice of all or parts of the proposed Code of Evidence of the American Law Institute. See Armstrong, Proposed Amendments to Federal Rules of Civil Procedure, 4 F.R.D. 124, 137-138.

Notes of Advisory Committee on 1966 Amendment to Rules

This new subdivision authorizes the court to appoint interpreters (including interpreters for the deaf), to provide for their compensation, and to tax the compensation as costs. Compare proposed subdivision (b) of Rule 28 of the Federal Rules of Criminal Procedure.

Notes of Advisory Committee on 1972 Amendment to Rules

Rule 43, entitled Evidence, has heretofore served as the basic rule of evidence for civil cases in federal courts. Its very general provisions are superseded by the detailed provisions of the new Rules of Evidence. The original title and many of the provisions of the rule are, therefore, no longer appropriate.

Subdivision (*a*). The provision for taking testimony in open court is not duplicated in the Rules of Evidence and is retained. Those dealing with admissibility of evidence and competency of witnesses, however, are no longer needed or appropriate since those topics are covered at large in the Rules of Evidence. They are accordingly deleted. The language is broadened, however, to take account of acts of Congress dealing with the taking of testimony, as well as of the Rules of Evidence and any other rules adopted by the Supreme Court.

Subdivision (*b*). The subdivision is no longer needed or appropriate since the matters with which it deals are treated in the Rules of Evidence. The use of leading questions, both generally and in the interrogation of an adverse party or witness identified with him, is the subject of Evidence Rule 611(c). Who may impeach is treated in Evidence Rule 601 and scope of cross-examination is covered in Evidence Rule 611(b). The subdivision is accordingly deleted.

Subdivision (*c*). Offers of proof and making a record of excluded evidence are treated in Evidence Rule 103. The subdivision is no longer needed or appropriate and is deleted.

References in Text

The Federal Rules of Evidence, referred to in subsec. (a), are set out in the Appendix to this title.

Effective Date of Amendments Proposed November 20, 1972, and December 18, 1972

Amendments of this rule embraced by orders entered by the Supreme Court of the United States on November 20, 1972, and December 18, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub. L. 93-595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2071 of this title.

Cross References

Amendment of pleading to conform to evidence, see rule 15.

Certified public accountant as witness before master, statement of accounts as evidence, see rule 53.

Compelling giving of testimony, application of rules, see rule 81.

Depositions of witnesses in foreign country, see section 1781 of this title.

Documentary evidence, see section 1731 et seq. of this title.

Evidence—

Generally, see section 1731 et seq. of this title.

Hearing before master, see rule 53.

Exceptions to rulings unnecessary, see rule 46.

Harmless error in admitting or excluding evidence, see rule 61.

Interested persons, competency, see section 1822 of this title.

Notary public and other persons authorized to administer oaths required by laws of the United States, see section 2903 of Title 5, Government Organization and Employees.

Offer of judgment, see rule 68.

Perpetuation of testimony by action, see rule 27.

Pre-trial procedure, see rule 16.

Proof of official record, see rule 44.

Record made in regular course of business, see section 1732 of this title.

Reeord on appeal, form of testimony included in, see rule 75.

Subpoena for attendance of witnesses and obtaining evidence, see rule 45.

Transcript of evidence, filing by master with report, see rule 53.

United States, evidence to establish claim on default, see rule 55.

Witnesses generally, see section 1821 ct seq. of this title.

Rule 44. Proof of Official Record

(a) Authentication

(1) *Domestic.* An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

(2) *Foreign.* A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuiness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuiness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) Lack of record

A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) Other proof

This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule provides a simple and uniform method of proving public records, and entry or lack of entry therein, in all cases including those specifically provided for by statutes of the United States. Such statutes are not superseded, however, and proof may also be made according to their provisions whenever they differ from this rule.

Some of those statutes are:

U.S.C., Title 28, former:

§ 661	(Copies of department or corporation records and papers; admissibility; seal)
§ 662	(Same; in office of General Counsel of the Treasury)
§ 663	(Instruments and papers of Comptroller of Currency; admissibility)
§ 664	(Organization certificates of national banks; admissibility)
§ 665	(Transcripts from books of Treasury in suits against delinquents; admissibility)
§ 666	(Same; certificate by Secretary or Assistant Secretary)
§ 670	(Admissibility of copies of statements of demands by Post Office Department)
§ 671	(Admissibility of copies of post office records and statement of accounts)
§ 672	(Admissibility of copies of records in General Land Office)
§ 673	(Admissibility of copies of records, and so forth, of Patent Office)
§ 674	(Copies of foreign letters patent as prima facie evidence)
§ 675	(Copies of specifications and drawings of patents admissible)
§ 676	(Extracts from Journals of Congress admissible when injunction of secrecy removed)
§ 677	(Copies of records in offices of United States consuls admissible)
§ 678	(Books and papers in certain district courts)
§ 679	(Records in clerks' offices, western district of North Carolina)
§ 680	(Records in clerks' offices of former district of California)
§ 681	(Original records lost or destroyed; certified copy admissible)
§ 682	(Same; when certified copy not obtainable)
§ 685	(Same; certified copy of official papers)
§ 687	(Authentication of legislative acts; proof of judicial proceedings of State)
§ 688	(Proofs of records in offices not pertaining to courts)
§ 689	(Copies of foreign records relating to land titles)
§ 695	(Writings and records made in regular course of business; admissibility)
§ 695e	(Foreign documents on record in public offices; certification)

U.S.C., Title 1:

§ 112	(Statutes at large; contents; admissibility in evidence)
§ 113	("Little and Brown's" edition of laws and treaties competent evidence of Acts of Congress)
§ 204	(Codes and supplements as establishing prima facie the laws of United States and District of Columbia, etc.)
§ 208	(Copies of supplements to Code of Laws of United States and of District of Columbia Code and supplements; conclusive evidence of original)

U.S.C., Title 5:

§ 490	(Records of Department of Interior; authenticated copies as evidence)

U.S.C., Title 6:

§ 7	(Surety Companies as sureties; appointment of agents; service of process)

U.S.C., Title 8:
§ 9a (Citizenship of children of persons naturalized under certain laws; repatriation of native-born women married to aliens prior to September 22, 1922; copies of proceedings)
§ 1443 (Regulations for execution of naturalization laws; certified copies of papers as evidence)
§ 1443 (Certifications of naturalization records; authorization; admissibility as evidence)
U.S.C., Title 11:
§ 44(d),(e), (f),(g) (Bankruptcy court proceedings and orders as evidence)
U.S.C., Title 15:
§ 127 (Trade-mark records in Patent Office; copies as evidence)
U.S.C., Title 20:
§ 52 (Smithsonian Institution; evidence of title to site and buildings)
U.S.C., Title 25:
§ 6 (Bureau of Indian Affairs; seal; authenticated and certified documents; evidence)
U.S.C., Title 31:
§ 46 (Laws governing General Accounting Office; copies of books, records, etc., thereof as evidence)
U.S.C., Title 38:
§ 11g (Seal of Veterans' Administration; authentication of copies of records)
U.S.C., Title 40:
§ 238 (National Archives; seal; reproduction of archives; fee; admissibility in evidence of reproductions)
§ 270c (Bonds of contractors for public works; right of person furnishing labor or material to copy of bond)
U.S.C., Title 43:
§§ 57-59 (Copies of land surveys, etc., in certain states and districts admissible as evidence)
§ 83 (General Land Office registers and receivers; transcripts of records as evidence)
U.S.C., Title 46:
§ 823 (Records of Maritime Commission; copies; publication of reports; evidence)
U.S.C., Title 47:
§ 154(m) (Federal Communications Commission; copies of reports and decisions as evidence)
§ 412 (Documents filed with Federal Communications Commission as public records; prima facie evidence; confidential records)
U.S.C., Title 49:
§ 14(3) (Interstate Commerce Commission reports and decisions; printing and distribution of copies)
§ 16(13) (Copies of schedules, tariffs, etc., filed with Interstate Commerce Commission as evidence)
§ 19a(i) (Valuation of property of carriers by Interstate Commerce Commission; final published valuations as evidence)

SUPPLEMENTARY NOTE OF ADVISORY COMMITTEE REGARDING RULES 43 AND 44

For supplementary note of Advisory Committee on this rule, see note under rule 43.

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

Subdivision (a)(1). These provisions on proof of official records kept within the United States are similar in substance to those heretofore appearing in Rule 44. There is a more exact description of the geographical areas covered. An official record kept in one of the areas enumerated qualifies for proof under subdivision (a)(1) even though it is not a United States official record. For example, an official record kept in one of these areas by a government in exile falls within subdivision (a)(1). It also falls within subdivision (a)(2) which may be availed of alternatively. *Cf. Banco de Espana* v. *Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940).

Subdivision (a)(2). Foreign official records may be proved, as heretofore, by means of official publications thereof. See *United States* v. *Aluminum Co. of America*, 1 F.R.D. 71 (S.D.N.Y. 1939). Under this rule, a document that, on its face, appears to be an official publication, is admissible, unless a party opposing its admission into evidence shows that it lacks that character.

The rest of subdivision (a)(2) aims to provide greater clarity, efficiency, and flexibility in the procedure for authenticating copies of foreign official records.

The reference to attestation by "the officer having the legal custody of the record," hitherto appearing in Rule 44, has been found inappropriate for official records kept in foreign countries where the assumed relation between custody and the authority to attest does not obtain. See 2B Barron & Holtzoff, Federal Practice & Procedure § 992 (Wright ed. 1961). Accordingly it is provided that an attested copy may be obtained from any person authorized by the law of the foreign country to make the attestation without regard to whether he is charged with responsibility for maintaining the record or keeping it in his custody.

Under Rule 44 a United States foreign service officer has been called on to certify to the authority of the foreign official attesting the copy as well as the genuineness of his signature and his official position. See Schlesinger, Comparative Law 57 (2d ed. 1959); Smit, International Aspects of Federal Civil Procedure, 61 Colum.L.Rev. 1031, 1063 (1961); 22 C.F.R. § 92.41(a), (e) (1958). This has created practical difficulties. For example, the question of the authority of the foreign officer might raise issues of foreign law which were beyond the knowledge of the United States officer. The difficulties are met under the amended rule by eliminating the element of the authority of the attesting foreign official from the scope of the certifying process, and by specifically permitting use of the chain-certificate method. Under this method, it is sufficient if the original attestation purports to have been issued by an authorized person and is accompanied by a certificate of another foreign official whose certificate may in turn be followed by that of a foreign official of higher rank. The process continues until a foreign official is reached as to whom the United States foreign service official (or a diplomatic or consular officer of the foreign country assigned or accredited to the United States) has adequate information upon which to base a "final certification." See *New York Life Ins. Co.* v. *Aronson*, 38 F.Supp. 687 (W.D. Pa. 1941); 22 C.F.R. § 92.37 (1958).

The final certification (a term used in contradistinction to the certificates prepared by the foreign officials in a chain) relates to the incumbency and genuineness of signature of the foreign official who attested the copy of the record or, where the chain-certificate method is used, of a foreign official whose certificate appears in the chain, whether that certificate is the last in the chain or not. A final certification may be prepared on the basis of material on file in the consulate or any other satisfactory information.

Although the amended rule will generally facilitate proof of foreign official records, it is recognized that in some situations it may be difficult or even impossible to satisfy the basic requirements of the rule. There may be no United States consul in a particular foreign country; the foreign officials may not cooperate, peculiarities may exist or arise hereafter in the law or practice of a foreign country. See *United States* v. *Grabina*, 119 F.2d 863 (2d Cir. 1941); and, generally, Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L.J. 515, 548-49 (1953). Therefore the final sentence of subdivision

(a)(2) provides the court with discretion to admit an attested copy of a record without a final certification, or an attested summary of a record with or without a final certification. See Rep. of Comm. on Comparative Civ. Proc. & Prac., Proc. A.B.A., Sec. Int'l & Comp. L. 123, 130-131 (1952); Model Code of Evidence §§ 517, 519 (1942). This relaxation should be permitted only when it is shown that the party has been unable to satisfy the basic requirements of the amended rule despite his reasonable efforts. Moreover, it is specially provided that the parties must be given a reasonable opportunity in these cases to examine into the authenticity and accuracy of the copy or summary.

Subdivision (b). This provision relating to proof of lack of record is accommodated to the changes made in subdivision (a).

Subdivision (c). The amendment insures that international agreements of the United States are unaffected by the rule. Several consular conventions contain provisions for reception of copies or summaries of foreign official records. See, e.g., Consular Conv. with Italy, May 8, 1878, art. X, 20 Stat. 725, T.S. No. 178 (Dept. State 1878). See also 28 U.S.C. §§ 1740-42, 1745; *Fakouri* v. *Cadais*, 149 F.2d 321 (5th Cir. 1945), cert. denied, 326 U.S. 742 (1945); 5 Moore's Federal Practice, par. 44.05 (2d ed. 1951).

CROSS REFERENCES

Authenticated and certified copy of Government record by Administrator of General Services admissible on evidence, see section 2112 of Title 44, Public Printing and Documents.

Rule 44.1. Determination of Foreign Law

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

(Added Feb. 28, 1966, eff. July 1, 1966, and amended Nov. 20, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

Rule 44.1 is added by amendment to furnish Federal courts with a uniform and effective procedure for raising and determining an issue concerning the law of a foreign country.

To avoid unfair surprise, the first sentence of the new rule requires that a party who intends to raise an issue of foreign law shall give notice thereof. The uncertainty under Rule 8(a) about whether foreign law must be pleaded—compare *Siegelman* v. *Cunard White Star, Ltd.*, 221 F.2d 189 (2d Cir. 1955), and *Pedersen* v. *United States*, 191 F.Supp. 95 (D.Guam 1961), with *Harrison* v. *United Fruit Co.*, 143 F.Supp. 598 (S.D.N.Y. 1956)—is eliminated by the provision that the notice shall be "written" and "reasonable." It may, but need not be, incorporated in the pleadings. In some situations the pertinence of foreign law is apparent from the outset; accordingly the necessary investigation of that law will have been accomplished by the party at the pleading stage, and the notice can be given conveniently in the pleadings. In other situations the pertinence of foreign law may remain doubtful until the case is further developed. A requirement that notice of foreign law be given only through the medium of the pleadings would tend in the latter instances to force the party to engage in a peculiarly burdensome type of investigation which might turn out to be unnecessary; and correspondingly the adversary would be forced into a possible wasteful investigation. The liberal provisions for amendment of the pleadings afford help if the pleadings are used as the medium of giving notice of the foreign law; but it seems best to permit a written notice to be given outside of and later than the pleadings, provided the notice is reasonable.

The new rule does not attempt to set any definite limit on the party's time for giving the notice of an issue of foreign law; in some cases the issue may not become apparent until the trial and notice then given may still be reasonable. The stage which the case has reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised, are among the factors which the court should consider in deciding a question of the reasonableness of a notice. If notice is given by one party it need not be repeated by any other and serves as a basis for presentation of material on the foreign law by all parties.

The second sentence of the new rule describes the materials to which the court may resort in determining an issue of foreign law. Heretofore the district courts, applying Rule 43(a), have looked in certain cases to State law to find the rules of evidence by which the content of foreign-country law is to be established. The State laws vary; some embody procedures which are inefficient, time consuming and expensive. See, generally, Nussbaum, Proving the Law of Foreign Countries, 3 Am.J.Comp.L. 60 (1954). In all events the ordinary rules of evidence are often inapposite to the problem of determining foreign law and have in the past prevented examination of material which could have provided a proper basis for the determination. The new rule permits consideration by the court of any relevant material, including testimony, without regard to its admissibility under Rule 43. Cf. N.Y.Civ.Prac.Law & Rules, R. 4511 (effective Sept. 1, 1963); 2 Va.Code Ann. tit. 8, § 8-273; 2 W.Va.Code Ann. § 5711.

In further recognition of the peculiar nature of the issue of foreign law, the new rule provides that in determining this law the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail. On the other hand, the court is free to insist on a complete presentation by counsel.

There is no requirement that the court give formal notice to the parties of its intention to engage in its own research on an issue of foreign law which has been raised by them, or of its intention to raise and determine independently an issue not raised by them. Ordinarily the court should inform the parties of material it has found diverging substantially from the material which they have presented; and in general the court should give the parties an opportunity to analyze and counter new points upon which it proposes to rely. See Schlesinger, Comparative Law 142 (2d ed. 1959); Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv.L.Rev. 1281, 1296 (1952); cf. *Siegelman* v. *Cunard White Star, Ltd.*, supra, 221 F.2d at 197. To require, however, that the court give formal notice from time to time as it proceeds with its study of the foreign law would add an element of undesirable rigidity to the procedure for determining issues of foreign law.

The new rule refrains from imposing an obligation on the court to take "judicial notice" of foreign law because this would put an extreme burden on the court in many cases; and it avoids use of the concept of "judicial notice" in any form because of the uncertain meaning of that concept as applied to foreign law. See, e.g., Stern, Foreign Law in the Courts: Judicial Notice and Proof, 45 Calif.L.Rev. 23, 43 (1957). Rather the rule provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties.

Under the third sentence, the court's determination of an issue of foreign law is to be treated as a ruling on a question of "law," not "fact," so that appellate review will not be narrowly confined by the "clearly erroneous" standard of Rule 52(a). *Cf. Uniform Judicial Notice of Foreign Law Act* § 3; Note, 72 Harv.L.Rev. 318 (1958).

The new rule parallels Article IV of the Uniform Interstate and International Procedure Act, approved by the Commissioners on Uniform State Laws in 1962, except that section 4.03 of Article IV states that "[t]he court, not the jury" shall determine foreign law. The new rule does not address itself to this problem, since the Rules refrain from allocating functions as between the court and the jury. See Rule 38(a). It has long been thought, however, that the jury is not the appropriate body to determine issues of foreign law. See, e.g., Story, Conflict of Laws, § 638 (1st ed. 1834, 8th ed. 1883); 1 Greenleaf, Evidence, § 486 (1st ed. 1842, 16th ed. 1899); 4 Wigmore, Evidence § 2558 (1st ed. 1905); 9 id. § 2558 (3d ed. 1940). The majority of the States have committed such issues to determination by the court. See Article 5 of the Uniform Judicial Notice of Foreign Law Act, adopted by twenty-six states, 9A U.L.A. 318 (1957) (Suppl. 1961, at 134); N.Y.Civ.Prac.Law & Rules, R. 4511 (effective Sept. 1, 1963); Wigmore, *loc. cit.* And Federal courts that have considered the problem in recent years have reached the same conclusion without reliance on statute. See *Janson* v. *Swedish American Line*, 185 F.2d 212, 216 (1st Cir. 1950); *Bank of Nova Scotia* v. *San Miguel*, 196 F.2d 950, 957, n. 6 (1st Cir. 1952); *Liechti* v. *Roche*, 198 F.2d 174 (5th Cir. 1952); *Daniel Lumber Co.* v. *Empresas Hondurenas, S.A.*, 215 F.2d 465 (5th Cir. 1954).

NOTES OF ADVISORY COMMITTEE ON 1972 AMENDMENTS TO RULES

Since the purpose of the provision is to free the judge, in determining foreign law, from any restrictions imposed by evidence rules, a general reference to the Rules of Evidence is appropriate and is made.

REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in text, are set out in the Appendix to this title.

EFFECTIVE DATE OF AMENDMENT PROPOSED NOVEMBER 20, 1972

Amendment of this rule embraced by the order entered by the Supreme Court of the United States on November 20, 1972, effective on the 180th day beginning after January 2, 1973, see section 3 of Pub. L. 93-595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2071 of this title.

Rule 45. Subpoena

(a) For attendance of witnesses; form; issuance

Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) For production of documentary evidence

A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) Service

A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.

(d) Subpoena for taking depositions; place of examination

(1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

(e) Subpoena for a hearing or trial

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper applica-

tion and cause shown may authorize the service of a subpoena at any other place.

(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.

(f) Contempt

Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule applies to subpoenas *ad testificandum* and *duces tecum* issued by the district courts for attendance at a hearing or a trial, or to take depositions. It does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority. The enforcement of such subpoenas by the district courts is regulated by appropriate statutes. Many of these statutes do not place any territorial limits on the validity of subpoenas so issued, but provide that they may be served anywhere within the United States. Among such statutes are the following:

U.S.C., Title 7, §§ 222 and 511n (Secretary of Agriculture)

U.S.C., Title 15, § 49 (Federal Trade Commission)

U.S.C., Title 15, §§ 77v(b), 78u(c), 79r(d) (Securities and Exchange Commission)

U.S.C., Title 16, §§ 797(g) and 825f (Federal Power Commission)

U.S.C., Title 19, § 1333(b) (Tariff Commission)

U.S.C., Title 22, §§ 268, 270d and 270e (International Commissions, etc.)

U.S.C., Title 26, § 1114 (Tax Court)

U.S.C., Title 26, § 1523(a) (Internal Revenue Officers)

U.S.C., Title 29, § 161 (Labor Relations Board)

U.S.C., Title 33, § 506 (Secretary of Army)

U.S.C., Title 35, § 24 (Patent Office proceedings)

U.S.C., Title 38, § 133 (Veterans' Administration)

U.S.C., Title 41, § 39 (Secretary of Labor)

U.S.C., Title 45, § 157 Third. (h) (Board of Arbitration under Railway Labor Act)

U.S.C., Title 45, § 222(b) (Investigation Commission under Railroad Retirement Act of 1935)

U.S.C., Title 46, § 1124(b) (Maritime Commission)

U.S.C., Title 47, § 409(c) and (d) (Federal Communications Commission)

U.S.C., Title 49, § 12(2) and (3) (Interstate Commerce Commission)

U.S.C., Title 49, § 173a (Secretary of Commerce)

Note to Subdivisions (a) and (b). These simplify the form of subpoena as provided in U.S.C., Title 28, former § 655 (Witnesses; subpoena; form; attendance under); and broaden U.S.C., Title 28, former § 636 (Production of books and writings) to include all actions, and to extend to any person. With the provision for relief from an oppressive or unreasonable subpoena *duces tecum*, compare N.Y.C.P.A. (1937) § 411.

Note to Subdivision (c). This provides for the simple and convenient method of service permitted under many state codes; e.g., N.Y.C.P.A. (1937) §§ 220, 404, J.Ct.Act, § 191; 3 Wash.Rev.Stat.Ann. (Remington, 1932) § 1218. Compare Equity Rule 15 (Process, by Whom Served).

For statutes governing fees and mileage of witnesses see:

U.S.C., Title 28, former:

§ 600a	(Per diem; mileage)
§ 600c	(Amount per diem and mileage for witnesses; subsistence)
§ 600d	(Fees and mileage in certain states)
§ 601	(Witnesses; fees; enumeration)
§ 602	(Fees and mileage of jurors and witnesses)
§ 603	(No officer of court to have witness fees)

Note to Subdivision (d). The method provided in paragraph (1) for the authorization of the issuance of subpoenas has been employed in some districts. See *Henning* v. *Boyle*, 112 Fed. 397 (S.D.N.Y., 1901). The requirement of an order for the issuance of a subpoena *duces tecum* is in accordance with U.S.C., Title 28, former § 647 (Deposition under *dedimus potestatem;* subpoena *duces tecum*). The provisions of paragraph (2) are in accordance with common practice. See U.S.C., Title 28, former § 648 (Deposition under *dedimus potestatem;* witnesses, when required to attend); N.Y.C.P.A. (1937) § 300; 1 N.J.Rev.Stat. (1937) 2:27-174.

Note to Subdivision (e). The first paragraph continues the substance of U.S.C., Title 28, former § 654 (Witnesses; subpoenas; may run into another district). Compare U.S.C., Title 11, § 69 (Referees in bankruptcy; contempts before) (production of books and writings) which is not affected by this rule. For examples of statutes which allow the court, upon proper application and cause shown, to authorize the clerk of the court to issue a subpoena for a witness who lives in another district and at a greater distance than 100 miles from the place of the hearing or trial, see:

U.S.C., Title 15:

§ 23	(Suits by United States; subpoenas for witnesses) (under antitrust laws).

U.S.C., Title 38:

§ 445	(Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions) (Veterans; insurance contracts).

The second paragraph continues the present procedure applicable to certain witnesses who are in foreign countries. See U.S.C., Title 28, formerly § 711 (now § 1783) (Letters rogatory to take testimony of witness, addressed to court of foreign country; failure of witness to appear; subpoena) and former § 713 (Service of subpoena on witness in foreign country).

Note to Subdivision (f). Compare former Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner).

NOTES OF ADVISORY COMMITTEE ON 1946 AND 1948 AMENDMENTS TO RULES

Note. Subdivision (b). The added words, "or tangible things" in subdivision (b) merely makes the rule for the subpoena duces tecum at the trial conform to that of subdivision (d) for the subpoena at the taking of depositions. The insertion of the words "or modify" in clause (1) affords desirable flexibility.

Subdivision (d). The added last sentence of amended subdivision (d)(1) properly gives the subpoena for documents or tangible things the same scope as provided in Rule 26(b), thus promoting uniformity. The requirement in the last sentence of original Rule 45(d)(1)—to the effect that leave of court should be obtained for the issuance of such a subpoena—has been omitted. This requirement is unnecessary and oppressive on both counsel and court, and it has been criticized by district judges. There is no satisfactory reason for a differentiation between a subpoena for the production of documentary evidence by a witness at a trial (Rule 45(a)) and for the production of the same evidence at the taking of a deposition. Under this amendment, the person subpoenaed may obtain the protection afforded by any of the orders permitted under Rule 30(b) or Rule 45(b). See Application of Zenith Radio Corp., (E.D.Pa. 1941), 4 Fed.Rules Serv. 30b.21, Case 1, 1 F.R.D. 627; *Fox* v. *House*, (E.D.Okla.) 1939, 29 F.Supp. 673; *United States of America for the Use of Tilo Roofing Co., Inc.* v. *J. Slotnik Co.*, (D.Conn. 1944), 3 F.R.D. 408.

The changes in subdivision (d)(2) give the court the same power in the case of residents of the district as is conferred in the case of non-residents, and permit the

court to fix a place for attendance which may be more convenient and accessible for the parties than that specified in the rule.

NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

At present, when a subpoena duces tecum is issued to a deponent, he is required to produce the listed materials at the deposition, but is under no clear compulsion to permit their inspection and copying. This results in confusion and uncertainty before the time the deposition is taken, with no mechanism provided whereby the court can resolve the matter. Rule 45(d)(1), as revised, makes clear that the subpoena authorizes inspection and copying of the materials produced. The deponent is afforded full protection since he can object, thereby forcing the party serving the supoena to obtain a court order if he wishes to inspect and copy. The procedure is thus analogous to that provided in Rule 34.

The changed references to other rules conform to changes made in those rules. The deletion of words in the clause describing the proper scope of the subpoena conforms to a change made in the language of Rule 34. The reference to Rule 26(b) is unchanged but encompasses new matter in that subdivision. The changes make it clear that the scope of discovery through a subpoena is the same as that applicable to Rule 34 and the other discovery rules.

CROSS REFERENCES

Motion for order for production of documents, see rule 34.

Scope of deposition on oral examination, see rule 26.

Subpoenas in civil cases brought by United States under anti-trust laws, see section 23 of Title 15, Commerce and Trade.

Rule 46. Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

NOTES OF ADVISORY COMMITTEE ON RULES

Abolition of formal exceptions is often provided by statute. See Ill.Rev.Stat. (1937), ch. 110, § 204; Neb.Comp.Stat. (1929) § 20-1139; N.M.Stat.Ann. (Courtright, 1929) § 105-830; 2 N.D.Comp.Laws Ann. (1913) § 7653; Ohio Code Ann. (Throckmorton, 1936) § 11560; 1 S.D.Comp.Laws (1929) § 2542; Utah Rev.Stat.Ann. (1933) §§ 104-39-2, 104-24-18; Va.Rules of Court, Rule 22, 163 Va. v, xii (1935); Wis.Stat. (1935) § 270.39. Compare N.Y.C.P.A. (1937) §§ 583, 445, and 446, all as amended by L. 1936, ch. 915. Rule 51 deals with objections to the court's instructions to the jury.

U.S.C., Title 28, former § 776 (Bill of exceptions; authentication; signing of by judge) and former § 875 (Review of findings in cases tried without a jury) are superseded insofar as they provide for formal exceptions, and a bill of exceptions.

CROSS REFERENCES

Form and admissibility of evidence, see rule 43.

Harmless error, see rule 61.

Objections to instructions, see rule 51.

FEDERAL RULES OF CRIMINAL PROCEDURE

Bills of exceptions abolished, see note of advisory committee under rule 39, Title 18, Appendix, Crimes and Criminal Procedure.

Exceptions unnecessary, see rule 51.

Rule 47. Jurors

(a) Examination of jurors

The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

(b) Alternate jurors

The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 preemptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be unpanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). This permits a practice found very useful by Federal trial judges. For an example of a state practice in which the examination by the court is supplemented by further inquiry by counsel, see Rule 27 of the Code of Rules for the District Courts of Minnesota, 186 Minn. xxxiii (1932), 3 Minn.Stat. (Mason, supp. 1936) Appendix, 4, p. 1062.

Note to Subdivision (b). The provision for an alternate juror is one often found in modern state codes. See N.C.Code (1935) § 2330(a); Ohio Gen.Code Ann. (Page, Supp. 1926-1935) § 11419-47; Pa.Stat.Ann. (Purdon, Supp. 1936) Title 17, § 1153; compare U.S.C., Title 28, former § 417a (Alternate jurors in criminal trials); 1 N.J.Rev.Stat. (1937) 2:91A-1, 2:91A-2, 2:91A-3.

Provisions for qualifying, drawing, and challenging of jurors are found in U.S.C., Title 28, former:

§ 411 (Qualifications and exemptions)
§ 412 (Manner of drawing)
§ 413 (Apportioned in district)
§ 415 (Not disqualified because of race or color)
§ 416 (Venire; service and return)
§ 417 (Talesmen for petit jurors)
§ 418 (Special juries)
§ 423 (Jurors not to serve more than once a year)
§ 424 (Challenges)

and D. C. Code (1930) Title 18, §§ 341-360 (Juries and Jury Commission) and Title 6, § 366 (Peremptory challenges.

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

The revision of this subdivision brings it into line with the amendment of Rule 24(c) of the Federal Rules of Criminal Procedure. That rule previously allowed four alternate jurors, as contrasted with the two allowed in civil cases, and the amendments increase the number of a maximum of six in all cases. The Advisory Committee's Note to amended Criminal Rule 24(c) points to experience demonstrating that four alternates may not be enough in some lengthy criminal trials; and the same may be said of civil trials. The Note adds:

"The words 'or are found to be' are added to the second sentence to make clear that an alternate juror may be called in the situation where it is first discovered during the trial that a juror was unable or disqualified to preform his duties at the time he was sworn."

CROSS REFERENCES

Challenges of jurors, see section 1870 of this title.
Jury trial of right, see rule 38.
Manner of drawing trial jurors, see section 1864 of this title.
Qualifications of jurors, see section 1861 of this title.

FEDERAL RULES OF CRIMINAL PROCEDURE

Trial jurors, see rule 24, Title 18, Appendix, Crimes and Criminal Procedure.

Rule 48. Juries of Less Than Twelve—Majority Verdict

The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

NOTES OF ADVISORY COMMITTEE ON RULES

For provisions in state codes, compare Utah Rev.Stat.Ann. (1933) § 48-O-5 (In civil cases parties may agree in open court on lesser number of jurors); 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 323 (Parties may consent to any number of jurors not less than three).

CROSS REFERENCES

Advisory jury, see rule 39.
Jury trial of right, see rule 38.
Right to jury trial, see U.S. Const. Amend. VII.

Rule 49. Special Verdicts and Interrogatories

(a) Special verdicts.

The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General verdict accompanied by answer to interrogatories

The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is consistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

The Federal courts are not bound to follow state statutes authorizing or requiring the court to ask a jury to find a special verdict or to answer interrogatories. *Victor American Fuel Co.* v. *Peccarich*, 209 Fed. 568 (C.C.A.8th, 1913) cert. den. 232 U.S. 727, 34 S.Ct. 603, 58 L.Ed. 817 (1914); *Spokane and I. E. R. Co.* v. *Campbell*, 217 Fed. 518 (C.C.A.9th, 1914), affd. 241 U.S. 497, 36 S.Ct. 683, 60 L.Ed. 1125 (1916); Simkins, *Federal Practice* (1934) § 186. The power of a territory to adopt by statute the practice under *Subdivision (b)* has been sustained. *Walker* v. *New Mexico and Southern Pacific R. R.*, 165 U.S. 593, 17 S.Ct. 421, 41 L.Ed. 837 (1897); *Southwestern Brewery and Ice Co.* v. *Schmidt*, 226 U.S. 162, 33 S.Ct. 68, 57 L.Ed. 170 (1912).

Compare Wis.Stat. (1935) §§ 270.27, 270.28 and 270.30 Green, A New Development in Jury Trial (1927), 13 A.B.A.J. 715; Morgan, A Brief History of Special Verdicts and Special Interrogatories, 1923, 32 Yale L.J. 575.

The provisions of U.S.C., Title 28, formerly § 400(3) (now §§ 2201, 2202) (Declaratory judgments authorized; procedure) permitting the submission of issues of fact to a jury are covered by this rule.

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

This amendment conforms to the amendment of Rule 58. See the Advisory Committee's Note to Rule 58, as amended.

CROSS REFERENCES

Advisory jury, see rule 39.
New trial, see rule 59.

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

(a) Motion for directed verdict: when made; effect

A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for judgment notwithstanding the verdict

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: conditional rulings on grant of motion

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: denial of motion

If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). The present federal rule is changed to the extent that the formality of an express reservation of rights against waiver is no longer necessary. See *Sampliner* v. *Motion Picture Patents Co.*, 254 U.S. 233, 41 S.Ct. 79, 65 L.Ed. 240 (1920); *Union Indemnity Co.* v. *United States*, 74 F.2d 645 (C.C.A.6th, 1935). The requirement that specific grounds for the motion for a directed verdict must be stated settles a conflict in the federal cases. See Simkins, Federal Practice (1934) § 189.

Note to Subdivision (b). For comparable state practice upheld under the conformity act, see *Baltimore and Carolina Line* v. *Redman*, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636 (1935); compare *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879, Ann.Cas. 1914D, 1029 (1913).

See *Northern Ry. Co.* v. *Page*, 274 U.S. 65, 47 S.Ct. 491, 71 L.Ed. 929 (1927), following the Massachusetts practice of alternative verdicts, explained in Thorndike, *Trial by Jury in United States Courts*, 26 Harv.L.Rev. 732 (1913). See also Thayer, Judicial Administration, 63 U. of Pa.L.Rev. 585, 600-601, and note 32 (1915); Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv.L.Rev. 669, 685 (1918); Comment, 34 Mich.L.Rev. 93, 98 (1935).

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

Subdivision (a). The practice, after the court has granted a motion for a directed verdict, of requiring the jury to express assent to a verdict they did not reach by their own deliberations serves no useful purpose and may give offense to the members of the jury. See 2B Barron & Holtzoff, Federal Practice and Procedure § 1072, at 367 (Wright ed. 1961); Blume, Origin and Development of the Directed Verdict, 48 Mich.L.Rev. 555, 582-85, 589-90 (1950). The final sentence of the subdivision, added by amendment, provides that the court's order granting a motion for a directed verdict is effective in itself, and that no action need be taken by the foreman or other members of the jury. See Ariz.R.Civ.P. 50(c); cf. Fed.R.Crim.P. 29 (a). No change is intended in the standard to be applied in deciding the motion. To assure this interpretation, and in the interest of simplicity, the traditional term, "directed verdict," is retained.

Subdivision (b). A motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence.

The amendment of the second sentence of this subdivision sets the time limit for making the motion for judgment n.o.v. at 10 days after the entry of judgment, rather than 10 days after the reception of the verdict. Thus the time provision is made consistent with that contained in Rule 59(b) (time for motion for new trial) and Rule 52(b) (time for motion to amend findings by the court).

Subdivision (c) deals with the situation where a party joins a motion for a new trial with his motion for judgment n.o.v. or prays for a new trial in the alternative, and the motion for judgment n.o.v. is grant-

ed. The procedure to be followed in making rulings on the motion for the new trial, and the consequences of the rulings thereon, were partly set out in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 253, 61 S.Ct. 189, 85 L.Ed. 147 (1940), and have been further elaborated in later cases. See *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849 (1947); *Globe Liquor Co., Inc.* v. *San Roman*, 332 U.S. 571, 68 S.Ct. 246, 92 L.Ed. 177 (1948); *Fountain* v. *Filson*, 336 U.S. 681, 69 S.Ct. 754, 93 L.Ed. 971 (1949); *Johnson* v. *New York, N.H. & H.R.R. Co.*, 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed. 77 (1952). However, courts as well as counsel have often misunderstood the procedure, and it will be helpful to summarize the proper practice in the text of the rule. The amendments do not alter the effects of a jury verdict or the scope of appellate review.

In the situation mentioned, subdivision (c)(1) requires that the court make a "conditional" ruling on the new-trial motion, i.e., a ruling which goes on the assumption that the motion for judgment n.o.v. was erroneously granted and will be reversed or vacated; and the court is required to state its grounds for the conditional ruling. Subdivision (c)(1) then spells out the consequences of a reversal of the judgment in the light of the conditional ruling on the new-trial motion.

If the motion for new trial has been conditionally granted, and the judgment is reversed, "the new trial shall proceed unless the appellate court has otherwise ordered." The party against whom the judgment n.o.v. was entered below may, as appellant, besides seeking to overthrow that judgment, also attack the conditional grant of the new trial. And the appellate court, if it reverses the judgment n.o.v., may in an appropriate case also reverse the conditional grant of the new trial and direct that judgment be entered on the verdict. See *Bailey* v. *Slentz*, 189 F.2d 406 (10th Cir. 1951); *Moist Cold Refrigerator Co.* v. *Lou Johnson Co.*, 249 F.2d 246 (9th Cir. 1957), cert. denied, 356 U.S. 968, 78 S.Ct. 1008, 2 L.Ed.2d 1074 (1958); *Peters* v. *Smith*, 221 F.2d 721 (3d Cir.1955); *Dailey* v. *Timmer*, 292 F.2d 824 (3d Cir. 1961), explaining *Lind* v. *Schenley Industries, Inc.*, 278 F.2d 79 (3d Cir.), cert. denied, 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60 (1960); *Cox* v. *Pennsylvania R.R.*, 120 A.2d 214 (D.C.Mun.Ct.App. 1956); 3 Barron & Holtzoff. Federal Practice and Procedure § 1302.1 at 346-47 (Wright ed. 1958); 6 Moore's Federal Practice ¶ 59.16 at 3915 n. 8a (2d ed. 1954).

If the motion for a new trial has been conditionally denied, and the judgment is reversed, "subsequent proceedings shall be in accordance with the order of the appellate court." The party in whose favor judgment n.o.v. was entered below may, as appellee, besides seeking to uphold that judgment, also urge on the appellate court that the trial court committed error in conditionally denying the new trial. The appellee may assert this error in his brief, without taking a cross-appeal. *Cf. Patterson* v. *Pennsylvania R.R.*, 238 F.2d 645, 650 (6th Cir. 1956); *Hughes* v. *St. Louis Nat. L. Baseball Club, Inc.*, 359 Mo. 993, 997, 224 S.W.2d 989, 992 (1949). If the appellate court concludes that the judgment cannot stand, but accepts the appellee's contention that there was error in the conditional denial of the new trial, it may order a new trial in lieu of directing the entry of judgment upon the verdict.

Subdivision (c)(2), which also deals with the situation where the trial court has granted the motion for judgment n.o.v., states that the verdict-winner may apply to the trial court for a new trial pursuant to Rule 59 after the judgment n.o.v. has been entered against him. In arguing to the trial court in opposition to the motion for judgment n.o.v., the verdict-winner may, and often will, contend that he is entitled, at the least, to a new trial, and the court has a range of discretion to grant a new trial or (where plaintiff won the verdict) to order a dismissal of the action without prejudice instead of granting judgment n.o.v. See *Cone* v. *West Virginia Pulp & Paper Co., supra*, 330 U.S. at 217, 218 67 S.Ct. at 755, 756, 91 L.Ed. 849. Subdivision (c)(2) is a reminder that the verdict-winner is entitled, even after entry of judgment n.o.v. against him, to move for a new trial in the usual course. If in these circumstances the motion is granted, the judgment is superseded.

In some unusual circumstances, however, the grant of the new-trial motion may be only conditional, and the judgment will not be superseded. See the situation in *Tribble* v. *Bruin*, 279 F.2d 424 (4th Cir. 1960) (upon a verdict for plaintiff, defendant moves for and obtains judgment n.o.v.; plaintiff moves for a new trial on the ground of inadequate damages; trial court might properly have granted plaintiff's motion, conditional upon reversal of the judgment n.o.v.).

Even if the verdict-winner makes no motion for a new trial, he is entitled upon his appeal from the judgment n.o.v. not only to urge that that judgment should be reversed and judgment entered upon the verdict, but that errors were committed during the trial which at the least entitle him to a new trial.

Subdivision (d) deals with the situation where judgment has been entered on the jury verdict, the motion for judgment n.o.v. and any motion for a new trial having been denied by the trial court. The verdict-winner, as appellee, besides seeking to uphold the judgment, may urge upon the appellate court that in case the trial court is found to have erred in entering judgment on the verdict, there are grounds for granting him a new trial instead of directing the entry of judgment for his opponent. In appropriate cases the appellate court is not precluded from itself directing that a new trial be had. See *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, 69 S.Ct. 1326, 93 L.Ed. 1704 (1949). Nor is it precluded in proper cases from remanding the case for a determination by the trial court as to whether a new trial should be granted. The latter course is advisable where the grounds urged are suitable for the exercise of trial court discretion.

Subdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied, since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage. It is, however, designed to give guidance on certain important features of the practice.

CROSS REFERENCES

Grounds for new trial, see rule 59.

Involuntary dismissal at end of plaintiff's case, see rule 41.

FEDERAL RULES OF CRIMINAL PROCEDURE

Motions for directed verdict abolished in criminal cases, see rule 29, Title 18, Appendix, Crimes and Criminal Procedure.

Rule 51. Instructions to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

NOTES OF ADVISORY COMMITTEE ON RULES

Supreme Court Rule 8 requires exceptions to the charge of the court to the jury which shall distinctly

state the several matters of law in the charge to which exception is taken. Similar provisions appear in the rules of the various Circuit Courts of Appeals.

CROSS REFERENCES

Formal exceptions unnecessary, see rule 46.
Motion for directed verdict, see rule 50.

Rule 52. Findings by the Court

(a) Effect

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment

Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

See former Equity Rule 70½, as amended Nov. 25, 1935 (Findings of Fact and Conclusions of Law), and U.S.C., Title 28, former § 764 (Opinion, findings, and conclusions in action against United States) which are substantially continued in this rule. The provisions of U.S.C., Title 28, former § 773 (Trial of issues of fact; by court) and former § 875 (Review in cases tried without a jury) are superseded insofar as they provide a different method of finding facts and a different method of appellate review. The rule stated in the third sentence of *Subdivision (a)* accords with the decisions on the scope of the review in modern federal equity practice. It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony. See *Silver King Coalition Mines, Co.* v. *Silver King Consolidated Mining Co.*, 204 Fed. 166 (C.C.A.8th, 1913), cert. den. 229 U.S. 624, 33 S.Ct. 1051, 57 L.Ed. 1356 (1913); *Warren* v. *Keep*, 155 U.S. 265, 15 S.Ct. 83, 39 L.Ed. 144 (1894); *Furrer* v. *Ferris*, 145 U.S. 132, 12 S.Ct. 821, 36 L.Ed. 649 (1892); *Tilghman* v. *Proctor*, 125 U.S. 136, 149, 8 S.Ct. 894, 31 L.Ed. 664 (1888); *Kimberly* v. *Arms*, 129 U.S. 512, 524, 9 S.Ct. 355, 32 L.Ed. 764 (1889). Compare *Kaeser & Blair, Inc.*, v. *Merchants' Ass'n*, 64 F.2d 575, 576 (C.C.A.6th, 1933); *Dunn* v. *Trefry*, 260 Fed. 147, 148 (C.C.A.1st, 1919).

In the following states findings of fact are required in all cases tried without a jury (waiver by the parties being permitted as indicated at the end of the listing): Arkansas, Civ.Code (Crawford, 1934) § 364; California, Code Civ.Proc. (Deering, 1937) §§ 632, 634; Colorado, 1 Stat.Ann. (1935) Code Civ.Proc. §§ 232, 291 (in actions before referees or for possession of and damages to land); Connecticut, Gen.Stats. §§ 5660, 5664; Idaho, 1 Code Ann. (1932) §§ 7-302 through 7-305; Massachusetts (equity cases), 2 Gen.Laws (Ter.Ed., 1932) ch. 214, § 23; Minnesota, 2 Stat. (Mason, 1927) § 9311; Nevada, 4 Comp.Laws (Hillyer, 1929) § 8783-8784; New Jersey, Sup.Ct. Rule 113, 2 N.J.Misc. 1197, 1239 (1924); New Mexico, Stat.Ann. (Courtright, 1929) § 105-813; North Carolina, Code (1935) § 569; North Dakota, 2 Comp.Laws Ann. (1913) § 7641; Oregon, 2 Code Ann. (1930) § 2-502; South Carolina, Code (Michie, 1932) § 649; South Dakota, 1 Comp.Laws (1929) §§ 2525-2526; Utah, Rev.Stat.Ann. (1933) § 104-26-2, 104-26-3; Vermont (where jury trial waived), Pub.Laws (1933) § 2069; Washington, 2 Rev.Stat.Ann. (Remington, 1932) § 367; Wisconsin, Stat. (1935) § 270.33. The parties may waive this requirement for findings in California, Idaho, North Dakota, Nevada, New Mexico, Utah, and South Dakota.

In the following states the review of findings of fact in all non-jury cases, including jury waived cases, is assimilated to the equity review: Alabama, Code Ann. (Michie, 1928) §§ 9498, 8599; California, Code Civ.Proc. (Deering, 1937) § 956a; but see 20 Calif.Law Rev. 171 (1932); Colorado, *Johnson* v. *Kountze*, 21 Colo. 486, 43 Pac. 445 (1895), semble; Illinois, *Baker* v. *Hinricks*, 359 Ill. 138, 194 N.E. 284 (1934), *Weininger* v. *Metropolitan Fire Ins. Co.*, 359 Ill. 584, 195 N.E. 420, 98 A.L.R. 169 (1935); Minnesota, *State Bank of Gibbon* v. *Walter*, 167 Minn. 37, 38, 208 N.W. 423 (1926), *Waldron* v. *Page*, 191 Minn. 302, 253 N.W. 894 (1934); New Jersey, N.J.Comp.Stat. (2 Cum.Supp. 1911-1924) Title 163, § 303, as interpreted in *Bussy* v. *Hatch*, 95 N.J.L. 56, 111 A. 546 (1920); New York, *York Mortgage Corporation* v. *Clotar Const. Corp.*, 254 N.Y. 128, 133, 172 N.E. 265 (1930); North Dakota, Comp.Laws Ann. (1913) § 7846, as amended by N.D.Laws 1933, ch. 208, *Milnor Holding Co.* v. *Holt*, 63 N.D. 362, 370, 248 N.W. 315 (1933); Oklahoma, *Wichita Mining and Improvement Co.* v. *Hale*, 20 Okla. 159, 167, 94 Pac. 530 (1908); South Dakota, *Randall* v. *Burk Township*, 4 S.D. 337, 57 N.W. 4 (1893); Texas, *Custard* v. *Flowers*, 14 S.W.2d 109 (1929); Utah, Rev.Stat.Ann. (1933) § 104-41-5; Vermont, *Roberge* v. *Troy*, 105 Vt. 134, 163 Atl. 770 (1933); Washington, 2 Rev.Stat.Ann. (Remington, 1932) §§ 309—316; *McCullough* v. *Puget Sound Realty Associates*, 76 Wash. 700, 136 Pac. 1146 (1913), but see *Cornwall* v. *Anderson*, 85 Wash. 369, 148 Pac. 1 (1915); West Virginia, *Kinsey* v. *Carr*, 60 W.Va. 449, 55 S.E. 1004 (1906), semble; Wisconsin, Stat. (1935) § 251.09; *Campbell* v. *Sutliff,—T1 193 Wis. 370, 214 N.W. 374 (1927)*, *Gessler* v. *Erwin Co.*, 182 Wis. 315, 193 N.W. 363 (1924).

For examples of an assimilation of the review of findings of fact in cases tried without a jury to the review at law as made in several states, see Clark and Stone, Review of Findings of Fact, 4 U. of Chi.L.Rev. 190, 215 (1937).

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. Subdivision (a). The amended rule makes clear that the requirement for findings of fact and conclusions of law thereon applies in a case with an advisory jury. This removes an ambiguity in the rule as originally stated, but carries into effect what has been considered its intent. 3 Moore's Federal Practice, 1938, 3119. *Hurwitz* v. *Hurwitz*, App.D.C. 1943, 78 U.S.App.D.C. 66, 136 F.2d 796.

The two sentences added at the end of Rule 52(a) eliminate certain difficulties which have arisen con-

cerning findings and conclusions. The first of the two sentences permits findings of fact and conclusions of law to appear in an opinion or memorandum of decision. See, e.g., *United States* v. *One 1941 Ford Sedan*, S.D.Tex. 1946, 65 F.Supp 84. Under original Rule 52(a) some courts have expressed the view that findings and conclusions could not be incorporated in an opinion. *Detective Comics, Inc.* v. *Bruns Publication*, S.D.N.Y. 1939, 28 F.Supp. 399; *Pennsylvania Co. for Insurance on Lives & Granting Annuities* v. *Cincinnati & L. E. R. Co.*, S.D.Ohio 1941, 43 F.Supp. 5; *United States* v. *Aluminum Co. of America*, S.D.N.Y. 1941, 2 F.R.D. 224, 5 Fed.Rules Serv. 52a.11, Case 3; see also s.c., 44 F.Supp. 97. But, to the contrary, see *Wellman* v. *United States*, D.Mass. 1938, 25 F.Supp. 868; *Cook* v. *United States*, D.Mass. 1939, 26 F.Supp. 253; *Proctor* v. *White*, D.Mass. 1939, 28 F.Supp. 161; *Green Valley Creamery, Inc.* v. *United States*, C.C.A.1st, 1939, 108 F.2d 342. See also *Matton Oil Transfer Corp.* v. *The Dynamic*, C.C.A.2d, 1941, 123 F.2d 999; *Carter Coal Co.* v. *Litz*, C.C.A.4th, 1944, 140 F.2d 934; *Woodruff* v. *Heiser*, C.C.A.10th, 1945, 150 F.2d 869; *Coca-Cola Co.* v. *Busch*, E.D.Pa. 1943, 7 Fed.Rules Serv. 59b.2, Case 4; Oglebay, Some Developments in Bankruptcy Law, 1944, 18 J. of Nat'l Ass'n of Ref. 68, 69. Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issues and the determination thereon. Thus they not only aid the appellate court on review, *Hurwitz* v. *Hurwitz*, App.D.C. 1943, 78 U.S.App.D.C. 66, 136 F.2d 796, but they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment Nordbye, Improvements in Statement of Findings of Fact and Conclusions of Law, 1 F.R.D. 25, 26–27; *United States* v. *Forness*, C.C.A.2d, 1942, 125 F.2d 928; cert. den., 1942, 316 U.S. 694, 62 S.Ct. 1293. These findings should represent the judge's own determination and not the long, often argumentative statements of successful counsel. *United States* v. *Forness*, supra: *United States* v. *Creseent Amusement Co.*, 1944, 323 U.S. 173, 65 S.Ct. 254. Consequently, they should be a part of the judge's opinion and decision, either stated therein or stated separately. *Matton Oil Transfer Corp.* v. *The Dynamic*, supra. But the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for overelaboration of detail or particularization of facts. *United States* v. *Forness*, supra; *United States* v. *Crescent Amusement Co.*, supra. See also *Petterson Lighterage & Towing Corp.* v. *New York Central R. Co.*, C.C.A.2d, 1942, 126 F.2d 992; *Brown Paper Mill Co., Inc.* v. *Irwin*, C.C.A.8th, 1943, 134 F.2d 337; *Allen Bradley Co.* v. *Local Union No. 3*, I.B.E.W., C.C.A.2d, 1944, 145 F.2d 215, rev'd on other grounds, 1945, 325 U.S. 797, 65 S.Ct. 1533; *Young* v. *Murphy*, N.D.Ohio 1946, 9 Fed.Rules Serv. 52a.11, Case 2.

The last sentence of Rule 52(a) as amended will remove any doubt that findings and conclusions are unnecessary upon decision of a motion, particularly one under Rule 12 or Rule 56, except as provided in amended Rule 41(b). As so holding, see *Thomas* v. *Peyser*, App.D.C. 1941, 118 F.2d 369; *Schad* v. *Twentieth Century-Fox Corp.*, C.C.A.3d, 1943, 136 F.2d 991; *Prudential Ins. Co. of America* v. *Goldstein*, E.D.N.Y. 1942, 43 F.Supp. 767; *Somers Coal Co.* v. *United States*, N.D.Ohio 1942, 2 F.R.D. 532, 6 Fed.Rules Serv. 52a.1, Case 1; *Pen-Ken Oil & Gas Corp.* v. *Warfield Natural Gas Co.*, E.D.Ky. 1942, 2 F.R.D. 355, 5 Fed.Rules Serv. 52a.1, Case 3; also Commentary, Necessity of Findings of Fact, 1941, 4 Fed.Rules Serv. 936.

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

This amendment conforms to the amendment of Rule 58. See the Advisory Committee's Note to Rule 58, as amended.

CROSS REFERENCES

Advisory jury, see rule 39.

Extension of time to apply for amendment of findings, limitation on, see rule 6.

Master's report, inclusion of findings of fact and conclusions of law, see rule 53.

Motion for new trial, amendment of findings on, see rule 59.

Special verdicts, making of findings on, see rule 49.

Stay of proceedings to enforce judgment pending disposition of motion to amend, see rule 62.

Rule 53. Masters

(a) Appointment and compensation

Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, a commissioner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference

A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) Powers

The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him or evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury.

(d) Proceeding

(1) *Meetings.* When a reference is made, the clerk shall forthwith furnish the master with a

copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) *Witnesses.* The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) *Statement of Accounts.* When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) Report

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) *In Jury Actions.* In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) *Stipulation as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) *Draft Report.* Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). This is a modification of former Equity Rule 68 (Appointment and Compensation of Masters).

Note to Subdivision (b). This is substantially the first sentence of former Equity Rule 59 (Reference to Master—Exceptional, Not Usual) extended to actions formerly legal. See *Ex parte Peterson* 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920).

Note to Subdivision (c). This is former Equity Rules 62 (Powers of Master) and 65 (Claimants Before Master Examinable by Him) with slight modifications. Compare former Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 51 (Evidence Taken Before Examiners, Etc.).

Note to Subdivision (d). (1) This is substantially a combination of the second sentence of former Equity Rule 59 (Reference to Master—Exceptional, Not Usual) and former Equity Rule 60 (Proceedings Before Master). Compare former Equity Rule 53 (Notice of Taking Testimony Before Examiner, Etc.).

(2) This is substantially former Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner).

(3) This is substantially former Equity Rule 63 (Form of Accounts Before Master).

Note to Subdivision (e). This contains the substance of former Equity Rules 61 (Master's Report—Documents Identified but not Set Forth), 61½ (Master's Report—Presumption as to Correctness—Review), and 66 (Return of Master's Report—Exceptions—Hearing), with modifications as to the form and effect of the report and for inclusion of reports by auditors, referees, and examiners, and references in actions formerly legal. Compare former Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 67 (Costs on Exceptions to Master's Report). See *Camden* v. *Stuart*, 144 U.S. 104, 12 S.Ct. 585, 36 L.Ed. 363 (1892); *Ex parte Peterson*, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920).

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

These changes are designed to preserve the admiralty practice whereby difficult computations are referred to a commissioner or assessor, especially after an interlocutory judgment determining liability. As to separation of issues for trial see Rule 42(b).

CROSS REFERENCES

Adoption of master's findings by court, see rule 52.

Clerks of courts, ineligible to appointment as master, see section 957 of this title.

Default judgment, reference to determine account or amount of damages, see rule 55.

Pre-trial determination as to preliminary reference, see rule 16.

Referees in bankruptcy, eligibility to appointment as, see section 63 of Title 11, Bankruptcy.

Report, judgment not required to recite, see rule 54.

Three-Judge Court, appointment of master by single judge, see section 2284 of this title.

United States magistrates, fees for attending to any reference, see section 633 of this title.

TITLE VII—JUDGMENT

Rule 54. Judgments; Costs

(a) Definition; Form

"Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment upon multiple claims or involving multiple parties

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs

Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Apr. 17, 1961, eff. July 19, 1961.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). The second sentence is derived substantially from former Equity Rule 71 (Form of Decree).

Note to Subdivision (b). This provides for the separate judgment of equity and code practice. See Wis.Stat. (1935) § 270.54; Compare N.Y.C.P.A. (1937) § 476.

Note to Subdivision (c). For the limitation on default contained in the first sentence, see 2 N.D.Comp.Laws Ann. (1913) § 7680; N.Y.C.P.A. (1937) § 479. Compare English Rules Under the Judicature Act (The Annual Practice, 1937) O. 13, r.r. 3-12. The remainder is a usual code provision. It makes clear that a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both. This necessarily includes the deficiency judgment in foreclosure cases formerly provided for by Equity Rule 10 (Decree for Deficiency in Foreclosures, Etc.).

Note to Subdivision (d). For the present rule in common law actions, see *Ex parte Peterson,* 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920); Payne, *Costs in Common Law Actions in the Federal Courts* (1935), 21 Va.L.Rev. 397.

The provisions as to costs in actions in *forma pauperis* contained in U.S.C., Title 28, former §§ 832—836 are unaffected by this rule. Other sections of U.S.C., Title 28, which are unaffected by this rule are: former §§ 815 (Costs; plaintiff not entitled to, when), 821 (Costs; infringement of patent; disclaimer), 825 (Costs; several actions), 829 (Costs; attorney liable for, when), and 830 (Costs; bill of; taxation).

The provisions of the following and similar statutes as to costs against the United States and its officers and agencies are specifically continued:

U.S.C., Title 15, §§ 77v(a), 78aa, 79y (Securities and Exchange Commission)
U.S.C., Title 16, § 825p (Federal Power Commission)
U.S.C., Title 26, §§ 3679(d) and 3745(d) (Internal revenue actions)
U.S.C., Title 26, § 3770(b)(2) (Reimbursement of costs of recovery against revenue officers)
U.S.C., Title 28, former § 817 (Internal revenue actions)
U.S.C., Title 28, former § 836 (United States—actions in *forma pauperis*)
U.S.C., Title 28, former § 842 (Actions against revenue officers)
U.S.C., Title 28, former § 870 (United States—in certain cases)
U.S.C., Title 28, former § 906 (United States—foreclosure actions)
U.S.C., Title 47, § 401 (Communications Commission)

The provisions of the following and similar statutes as to costs are unaffected:

U.S.C., Title 7, § 210(f) (Actions for damages based on an order of the Secretary of Agriculture under Stockyards Act)
U.S.C., Title 7, § 499g(c) (Appeals from reparations orders of Secretary of Agriculture under Perishable Commodities Act)
U.S.C., Title 8, § 45 (Action against district attorneys in certain cases)
U.S.C., Title 15, § 15 (Actions for injuries due to violation of antitrust laws)
U.S.C., Title 15, § 72 (Actions for violation of law forbidding importation or sale of articles at less than market value or wholesale prices)
U.S.C., Title 15, § 77k (Actions by persons acquiring securities registered with untrue statements under Securities Act of 1933)
U.S.C., Title 15, § 78i(e) (Certain actions under the Securities Exchange Act of 1934)
U.S.C., Title 15, § 78r (Similar te 78i(e))
U.S.C., Title 15, § 96 (Infringement of trade-mark—damages)
U.S.C., Title 15, § 99 (Infringement of trade-mark—injunctions)
U.S.C., Title 15, § 124 (Infringement of trade-mark—damages)
U.S.C., Title 19, § 274 (Certain actions under customs law)
U.S.C., Title 30, § 32 (Action to determine right to possession of mineral lands in certain cases)
U.S.C., Title 31, §§ 232 and 234 (Action for making false claims upon United States)
U.S.C., Title 33, § 926 (Actions under Harbor Workers' Compensation Act)
U.S.C., Title 35, § 67 (Infringement of patent—damages)
U.S.C., Title 35, § 69 (Infringement of patent—pleading and proof)
U.S.C., Title 35, § 71 (Infringement of patent—when specification too broad)

U.S.C., Title 45, § 153p (Actions for non-compliance with an order of National R. R. Adjustment Board for payment of money)
U.S.C., Title 46, § 38 (Action for penalty for failure to register vessel)
U.S.C., Title 46, § 829 (Action based on non-compliance with an order of Maritime Commission for payment of money)
U.S.C., Title 46, § 941 (Certain actions under Ship Mortgage Act)
U.S.C., Title 46, § 1227 (Actions for damages for violation of certain provisions of the Merchant Marine Act, 1936)
U.S.C., Title 47, § 206 (Actions for certain violations of Communications Act of 1934)
U.S.C., Title 49, § 16(2) (Action based on non-compliance with an order of I. C. C. for payment of money)

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. The historic rule in the federal courts has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in those special instances covered by statute. *Hohorst* v. *Hamburg-American Packet Co.*, 1893, 148 U.S. 262, 13 S.Ct. 590; *Rexford* v. *Brunswick-Balke-Collender Co.*, 1913, 228 U.S. 339, 33 S.Ct. 515; *Collins* v. *Miller*, 1920, 252 U.S. 364, 40 S.Ct. 347. Rule 54(h) was originally adopted in view of the wide scope and possible content of the newly created "civil action" in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case. It was not designed to overturn the settled federal rule stated above, which, indeed, has more recently been reiterated in *Catlin* v. *United States*, 1945, 324 U.S. 229, 65 S.Ct. 631. See also *United States* v. *Florian*, 1941, 312 U.S. 656, 61 S.Ct. 713, rev'g, and restoring the first opinion in, *Florian* v. *United States*, C.C.A.7th, 1940, 114 F.2d 990; *Reeves* v. *Beardall*, 1942, 316 U.S. 283, 62 S.Ct. 1085.

Unfortunately, this was not always understood, and some confusion ensued. Hence situations arose where district courts made a piecemeal disposition of an action and entered what the parties thought amounted to a judgment, although a trial remained to be had on other claims similar or identical with those disposed of. In the interim the parties did not know their ultimate rights, and accordingly took an appeal, thus putting the finality of the partial judgment in question. While most appellate courts have reached a result generally in accord with the intent of the rule, yet there have been divergent precedents and division of views which have served to render the issues more clouded to the parties appeliant. It hardly seems a case where multiplicity of precedents will tend to remove the problem from debate. The problem is presented and discussed in the following cases: *Atwater* v. *North American Coal Corp.*, C.C.A.2d, 1940, 111 F.2d 125; *Rosenblum* v. *Dingfelder*, C.C.A.2d, 1940, 111 F.2d 406; *Audi-Vision, Inc.* v. *RCA Mfg. Co., Inc.*, C.C.A.2d, 1943, 136 F.2d 621; *Zalkind* v. *Scheinman*, C.C.A.2d, 1943, 139 F.2d 895; *Oppenheimer* v. *F. J. Young & Co., Inc.*, C.C.A.2d, 1944, 144 F.2d 387; *Libbey-Owens-Ford Glass Co.* v. *Sylvania Industrial Corp.*, C.C.A.2d, 1946, 154 F.2d 814, cert. den., 1946, 66 S.Ct. 1353; *Zarati Steamship Co.* v. *Park Bridge Corp.*, C.C.A.2d, 1946, 154 F.2d 377; *Baltimore and Ohio R. Co.* v. *United Fuel Gas Co.*, C.C.A.4th, 1946, 154 F.2d 545; *Jefferson Electric Co.* v. *Sola Electric Co.*, C.C.A.7th, 1941, 122 F.2d 124; *Leonard* v. *Socony-Vacuum Oil Co.*, C.C.A.7th, 1942, 130 F.2d 535; *Markham* v. *Kasper*, C.C.A.7th, 1945, 152 F.2d 270; *Hanney* v. *Franklin Fire Ins. Co. of Philadelphia*, C.C.A.9th, 1944, 142 F.2d 864; *Toomey* v. *Toomey*, App.D.C. 1945, 80 U.S.App.D.C. 77, 149 F.2d 19.

In view of the difficulty thus disclosed, the Advisory Committee in its two preliminary drafts of proposed amendments attempted to redefine the original rule with particular stress upon the interlocutory nature of partial judgments which did not adjudicate all claims arising out of a single transaction or occurrence. This attempt appeared to meet with almost universal approval from those of the profession commenting upon it, although there were, of course, helpful suggestions for additional changes in language or clarification of detail. But cf. Circuit Judge Frank's dissenting opinion in *Libbey-Owens-Ford Glass Co.* v. *Sylvania Industrial Corp.*, supra, n. 21 of the dissenting opinion. The Committee, however, became convinced on careful study of its own proposals that the seeds of ambiguity still remained, and that it had not completely solved the problem of piecemeal appeals. After extended consideration, it concluded that a retention of the older federal rule was desirable, and that this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule. This is afforded by amended Rule 54(b). It re-establishes an ancient policy with clarity and precision. For the possibility of staying execution where not all claims are disposed of under Rule 54(b), see amended Rule 62(h).

NOTES OF ADVISORY COMMITTEE ON 1961 AMENDMENT TO RULES

This rule permitting appeal, upon the trial court's determination of "no just reason for delay," from a judgment upon one or more but less than all the claims in an action, has generally been given a sympathetic construction by the courts and its validity is settled. *Reeves* v. *Beardall*, 316 U.S. 283 (1942); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427 (1956); *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U.S. 445 (1956).

A serious difficulty has, however, arisen because the rule speaks of claims but nowhere mentions parties. A line of cases has developed in the circuits consistently holding the rule to be inapplicable to the dismissal, even with the requisite trial court determination, of one or more but less than all defendants jointly charged in an action, i.e. charged with various forms of concerted or related wrongdoing or related liability. See *Mull* v. *Ackerman*, 279 F.2d 25 (2d Cir. 1960); *Richards* v. *Smith*, 276 F.2d 652 (5th Cir. 1960); *Hardy* v. *Bankers Life & Cas. Co.*, 222 F.2d 827 (7th Cir. 1955); *Steiner* v. *20th Century-Fox Film Corp.*, 220 F.2d 105 (9th Cir. 1955). For purposes of Rule 54(b) it was arguable that there were as many "claims" as there were parties defendant and that the rule in its present text applied where less than all of the parties were dismissed, cf. *United Artists Corp.* v. *Masterpiece Productions, Inc.*, 221 F.2d 213, 215 (2d Cir. 1955); *Bowling Machines, Inc.* v. *First Nat. Bank*, 283 F.2d 39 (1st Cir. 1960); but the Courts of Appeals are now committed to an opposite view.

The danger of hardship through delay of appeal until the whole action is concluded may be at least as serious in the multiple-parties situations as in multiple-claims cases, see *Pabellon* v. *Grace Line, Inc.*, 191 F.2d 169, 179 (2d Cir. 1951), cert. denied, 342 U.S. 893 (1951), and courts and commentators have urged that Rule 54(b) be changed to take in the former. See *Reagan* v. *Traders & General Ins. Co.*, 255 F.2d 845 (5th Cir. 1958); *Meadows* v. *Greyhound Corp.*, 235 F.2d 233 (5th Cir. 1956); *Steiner* v. *20th Century-Fox Film Corp.*, supra; 6 Moore's Federal Practice ¶ 54.34[2] (2d ed. 1953); 3 Barron & Holtzoff, *Federal Practice & Procedure* § 1193.2 (Wright ed. 1958); *Developments in the Law—Multiparty Litigation*, 71 Harv.L.Rev. 874, 981 (1958); Note, 62 Yale L.J. 263, 271 (1953); Ill.Ann.Stat. ch. 110, § 50(2) (Smith-Hurd 1956). The amendment accomplishes this purpose by referring explicitly to parties.

There has been some recent indication that interlocutory appeal under the provisions of 28 U.S.C. § 1292(b), added in 1958, may now be available for the multiple-parties cases here considered. See *Jaftex Corp.* v. *Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960). The Rule 54(b) procedure seems preferable for those cases, and § 1292(b) should be held inapplicable to them when the rule is enlarged as here proposed. See *Luckenbach Steamship Co., Inc.*, v. *H. Muehlstein*

& Co., Inc., 280 F.2d 755, 757 (2d Cir. 1960); 1 Barron & Holtzoff, supra, § 58.1, p. 321 (Wright ed. 1960).

CROSS REFERENCES

Amendment or alteration of judgment—
Stay of proceedings pending disposition of motion for, see rule 62.
Time for service of motion, see rule 59.
Appellate court directing entry of judgment, see section 2106 of this title.
Attachment of property of person disobeying judgment for specific acts, see rule 70.
Bills of review abolished, see rule 60.
Certified copy of satisfaction of judgment, registration, see section 1963 of this title.
Civil docket, entry of judgment in, see rule 79.
Contempt by disobeying judgment directing performance of specific acts, see rule 70.
Copies, clerk to keep correct copy of every final judgment, see rule 79.
Costs—
Absent defendant, setting aside judgment and pleading on payment of, see section 1655 of this title.
Admiralty, taxation, see section 1925 of this title.
Admissions on genuineness of documents or truth of factual matters, expenses on failure to make, see rule 37.
Affidavits, see sections 1915 and 1924 of this title.
Agencies of United States, see section 2408 of this title.
Amount in controversy, removal of action against carrier te district court, see section 1445 of this title.
Appeal, in forma pauperis proceeding, see section 1915 of this title.
Briefs, taxation of printing as, see section 1923 of this title.
Certiorari, delay by petition for writ, see section 2103 of this title.
Claimant in proceedings to condemn or forfeit property seized, see section 2465 of this title.
Clerk of court of appeals, payment into Treasury, see section 711 of this title.
Contempt of witness in foreign country failing to respond to subpoena, see section 1784 of this title.
Copies of papers, taxation as, see section 1920 of this title.
Counsel's liability for excessive, see section 1927 of this title.
Default judgment including, see rule 55.
Delay of entry of judgment for taxing of, see rule 58.
Denial of to plaintiff where plaintiff recovers less than $10,000, see sections 1331 and 1332 of this title.
Dismissal for lack of jurisdiction, see section 1919 of this title.
District court, see section 1918 of this title.
Docket fees, see sections 1920, 1922 and 1923 of this title.
Exemplification of papers, taxation, see section 1920 of this title.
Fees, taxation as, see section 1920 of this title.
Filing and inclusion of bill of costs in judgment or decree, see section 1920 of this title.
Fine and forfeitures for violating act of Congress, see section 1918 of this title.
Forma pauperis proceeding, see section 1915 of this title.
Garnishment by United States, see section 2405 of this title.
Jurisdiction of district court, amount in controversy, see section 1332 of this title.
Maritime cases, taxation, see section 1925 of this title.
Offer of judgment affecting, see rule 68.
Patont infringement action, see section 1928 of this title.
Previously dismissed action, see rule 41.
Removal of causes, bond to accompany petition for removal, see section 1446 of this title.
Seamen's suits, see section 1916 of this title.
Security not required of United States, see section 2408 of this titie.
Stay of execution and enforcement of judgment to obtain certiorari from Supreme Court, see section 2101 of this title.
Summary judgment, affidavits presented in bad faith, see rule 56.
Taxation, see sections 1920 and 1921 of this title.
United States, liability for, see section 2412 of this title.
United States marshal's fees, see section 1921 of this title.
Verification of bill of, see section 1924 of this title.
Witness fees, taxation as, see sections 1920 and 1922 of this title.
Counterclaim or cross-claim judgment on, see rule 13.
Court of Claims judgment finding plaintiff indebted to United States as judgment of district court, see section 2508 of this title.
Court record of judgment lost or destroyed, enforcement where United States is interested, see section 1735 of this title.
Declaratory judgment, see rule 57 and sections 2201 and 2202 of this title.
Default judgment, see rule 55.
Docketing judgment to constitute lien, see section 1962 of this title.
Entry of judgment—
New judgment on motion for new trial, see rule 59.
On verdict by clerk, see rule 58.
Extension of time for relief from judgment, see rule 6.
Finality of judgment unaffected by motion for relief, see rule 60.
Garnishment by United States against corporation, see section 2405 of this title.
Index to be kept by clerk of every judgment, see rule 79.
Indexing of judgment to constitute lien, see section 1962 of this title.
Interest on judgments, see sections 1961 and 2411.
Interrogatories, entry of judgment on, see rule 58.
Judge to approve form of judgment, see rule 58.
Lien, judgment as, see section 1962.
Modification of judgment, errors not affecting substantial rights not ground for, see rule 61.
Motion for judgment in action by United States against delinquents for public money, see section 2407 of this title.
New trial, stay of proceedings to enforce judgment on motion for, see rule 62.
Notation in docket as entry of judgment, see rule 58.
Offer of judgment, see rule 68.
Opening judgment on motion for new trial, see rule 59.
Pleading judgment, see rule 9.
Possession, enforcement of judgment directing delivery, see rule 70.
Recording judgment to constitute lien, see section 1962 of this title.
Registration of judgment, see sections 1962 and 1963 of this title.
Relief from judgment, grounds for, see rule 60.
Removal of causes, attachment or sequestration to hold goods or estate of defendant to answer judgment, see section 1450 of this title.
Reopening judgment after verdict on motion for directed verdict, see rule 50.
Sales under judgment, see section 1961 et seq. of this title.
Security on stay of proceedings to enforce judgment, see rule 62.
Special verdict, entry of judgment on, see rule 58.
State law, staying enforcement of judgment in accordance to, see rule 62.

Stay of—
Judgment on less than all of multiple claims, see rule 62.
Proceedings to enforce judgment, see rule 62.
Stipulation for stay of execution of process in rem issued in admiralty case, see section 2464 of this title.
Summary judgment—
Procedure generally, see rule 56.
Single judge of Three-Judge Court not to enter, see section 2284 of this title.
Suspension of judgment by motion for relief, see rule 60.
Third party tort liability to United States for hospital and medical care, see section 2651 et seq. of Title 42, The Public Health and Welfare.
Time—
Entry of judgment, see rule 58.
Extension of, for relief from judgment, see rule 6.
Motion for relief from judgment, see rule 60.
Motion to alter or amend judgment, extension of, see rule 6.
Proceedings to enforce judgment, see rule 62.
United States—
Payment of judgments against, see section 2414 of this title.
Stay of judgment against, see rule 62.
Tort claims against, judgment as bar to action against employee, see section 2676.
Vacation of judgment, errors not affecting substantial rights not ground for, see rule 61.
Verdict submitted on written interrogatories to jury, judgment on, see rule 49.
Writs of coram nobis, coram vobis and audita querela abolished, see rule 60.

Rule 55. Default

(a) Entry

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) Judgment

Judgment by default may be entered as follows:

(1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting aside default

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, counterclaimants, cross-claimants

The provisions of this rule apply whether the party entitled to the judgment by default is a plantiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment against the United States

No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

NOTES OF ADVISORY COMMITTEE ON RULES

This represents the joining of the equity decree *pro confesso* (former Equity Rules 12 (Issue of Subpoena—Time for Answer), 16 (Defendant to Answer—Default—Decree *Pro Confesso*), 17 (Decree *Pro Confesso* to be Followed by Final Decree—Setting Aside Default), 29 (Defenses—How Presented), 31 (Reply—When Required—When Cause at Issue)) and the judgment by default now governed by U.S.C., Title 28, former § 724 (Conformity act). For dismissal of an action for failure to comply with these rules or any order of the court, see rule 41(b).

Note to Subdivision (a). The provision for the entry of default comes from the Massachusetts practice, 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, § 57. For affidavit of default, see 2 Minn.Stat. (Mason, 1927) § 9256.

Note to Subdivision (b). The provision in paragraph (1) for the entry of judgment by the clerk when plaintiff claims a sum certain is found in the N.Y.C.P.A. (1937) § 485, in Calif.Code Civ.Proc. (Deering, 1937) § 585(1), and in Conn.Practice Book (1934) § 47. For provisions similar to paragraph (2), compare Calif.Code, *supra*, § 585(2); N.Y.C.P.A. (1937) § 490; 2 Minn.Stat. (Mason, 1927) § 9256(3); 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 411(2). U.S.C., Title 28, § 785 (Action to recover forfeiture in bond) and similar statutes are preserved by the last clause of paragraph (2).

Note to Subdivision (e). This restates substantially the last clause of U.S.C., Title 28, former § 763 (Action against the United States under the Tucker Act). As this rule governs in all actions against the United States, U.S.C., Title 28, former § 45 (Practice and procedure in certain cases under the interstate commerce laws) and similar statutes are modified insofar as they contain anything inconsistent therewith.

SUPPLEMENTARY NOTE OF ADVISORY COMMITTEE REGARDING THIS RULE

Note. The operation of Rule 55(b) (Judgment) is directly affected by the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix, § 501 et seq. Section 200 of the Act [50 U.S.C. Appendix, § 520] imposes specific requirements which must be fulfilled before a default judgment can be entered, e.g., *Ledwith* v. *Storkan*, D.Neb. 1942, 6 Fed.Rules Serv. 60b.24, Case 2, 2 F.R.D. 539, and also provides for the vacation of a judgment in certain circumstances. See discussion in Commentary, Effect of Conscription Legislation on the Federal Rules, 1940, 3 Fed.Rules Serv. 725; 3 Moore's Federal Practice, 1938, Cum.Supplement § 55.02.

CROSS REFERENCES

Demand for judgment, see rule 54.

Failure to serve answers to interrogatories, entry of default judgment, see rule 37.

Relief awarded on default, see rule 54.

Summons as notice to defendant, judgment by default will be entered on failure to appear and defend, see rule 4.

Rule 56. Summary Judgment

(a) For claimant

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule is applicable to all actions, including those against the United States or an officer or agency thereof.

Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600 applications for summary judgments. Report of the Commission on the Administration of Justice in New York State (1934), p. 383. See also Third Annual Report of the Judicial Council of the State of New York (1937), p. 30.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. English Rules Under the Judicature Act (The Annual Practice, 1937) O. 3, r. 6; Orders 14, 14A, and 15; see also O. 32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp.Laws (1929) § 14260) and Illinois (Ill.Rev.Stat. (1937) ch. 110, §§ 181, 259.15, 259.16), it is not limited to liquidated demands. New York (N.Y.R.C.P. (1937) Rule 113; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State (1934) recommend that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow. The Summary Judgment (1929), 38 Yale L.J. 423.

Note to Subdivision (d). See Rule 16 (Pre-Trial Procedure; Formulating Issues) and the *Note* thereto.

Note to Subdivisions (e) and (f). These are similar to rules in Michigan. Mich.Court Rules Ann. (Searl, 1933) Rule 30.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. Subdivision (a). The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in *Peoples Bank* v. *Federal Reserve Bank of San Francisco,* N.D.Cal. 1944, 58 F.Supp. 25, the plaintiff's counter-motion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12(a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56(c) means that under original Rule 56(a) a minimum period of 30 days necessarily has to elapse in every case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. See *United States* v. *Adler's Creamery, Inc.,* (C.C.A.2d, 1939), 107 F.2d 987. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself makes a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

Subdivision (c). The amendment of Rule 56(c), by the addition of the final sentence, resolves a doubt expressed in *Sartor* v. *Arkansas Natural Gas Corp.,* 1944, 321 U.S. 620, 64 S.Ct. 724. See also Commentary, Summary Judgment as to Damages, 1944, 7 Fed.Rules Serv. 974; *Madeirense Do Brasil S/A* v. *Stulman-Emrick Lumber Co.,* (C.C.A.2d, 1945) 147 F.2d 399, cert. den., 1945, 325 U.S. 861, 65 S.Ct. 1201. It makes clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, interlocutory in character, and the precise amount of recovery left for trial.

Subdivision (d). Rule 54(a) defines "judgment" as including a decree and "any order from which an appeal lies." Subdivision (d) of Rule 56 indicates clearly, however, that a partial summary "judgment" is not a final judgment, and, therefore, that it is not appealable, unless in the particular case some statute allows an appeal from the interlocutory order involved. The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact. See *Leonard* v. *Socony-Vacuum Oil Co.,* C.C.A.7th, 1942, 130 F.2d 535; *Biggins* v. *Oltmer Iron Works,* C.C.A.7th, 1946, 154 F.2d 214; 3 Moore's Federal Practice, 1938. 3190-3192. Since interlocutory appeals are not allowed, except where specifically provided by statute, see 3 Moore, op. cit. supra, 3155-3156, this interpretation is in line with that policy, *Leonard* v. *Socony-Vacuum Oil Co.,* supra. See also *Audi Vision, Inc.,* v. *RCA Mfg. Co.,* C.C.A.2d, 1943, 136 P.2d 621; *Toomey* v. *Toomey,* App.D.C. 1945, 80 U.S.App.D.C. 77, 149 F.2d 19; *Biggins* v. *Oltmer Iron Works,* supra; *Catlin* v. *United States,* 1945, 324 U.S. 229, 65 S.Ct. 631.

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

Subdivision (c). By the amendment "answers to interrogatories" are included among the materials which may be considered on motion for summary judgment. The phrase was inadvertently omitted from the rule, see 3 Barron & Holtzoff, Federal Practice and Procedure 159-60 (Wright ed. 1958), and the courts have generally reached by interpretation the result which will hereafter be required by the text of the amended rule. See Annot., 74 A.L.R.2d 984 (1960).

Subdivision (e). The words "answers to interrogatories" are added in the third sentence of this subdivision to conform to the amendment of subdivision (c).

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matters sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well-pleaded," and not suppositious, conclusory, or ultimate. See *Frederick Hart & Co., Inc.* v. *Recordgraph Corp.,* 169 F.2d 580 (3d Cir. 1948); *United States ex rel. Kolton* v. *Halpern,* 260 F.2d 590 (3d Cir. 1958); *United States ex rel. Nobles* v. *Ivey Bros. Constr. Co., Inc.,* 191 F.Supp. 383 (D.Del. 1961); *Jamison* v. *Pennsylvania Salt Mfg. Co.,* 22 F.R.D. 238 (W.D.Pa. 1958); *Bunny Bear, Inc.* v. *Dennis Mitchell Industries,* 139 F.Supp. 542 (E.D.Pa. 1956); *Levy* v. *Equitable Life Assur. Society,* 18 F.R.D. 164 (E.D.Pa. 1955).

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 Moore's Federal Practice 2069 (2d ed. 1953); 3 Barron & Holtzoff, supra, § 1235.1.

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

Nor is the amendinent designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presentod. And summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

CROSS REFERENCES

Dismissal of action prior to service of motion for summary judgment, see rule 41.

Findings of fact and conclusions of law unnecessary, see rule 52.

Injunctions, single judge not to enter summary judgment, see section 2284 of this title.

Motions treated as for summary judgment—
Dismiss for failure of pleading to state a claim upon which relief can be granted, see rule 12.
Judgment on the pleadings, see rule 12.

Rule 57. Declaratory Judgments

The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C., § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949.)

NOTES OF ADVISORY COMMITTEE ON RULES

The fact that a declaratory judgment may be granted "whether or not further relief is or could be prayed" indicates that declaratory relief is alternative or cumulative and not exclusive or extraordinary. A declaratory judgment is appropriate when it will "terminate the controversy" giving rise to the proceeding. Inasmuch as it often involves only an issue of law on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion, as provided for in California (Code Civ.Proc. (Deering, 1937) § 1062a), Michigan (3 Comp.Laws (1929) § 13904), and Kentucky (Codes (Carroll, 1932) Civ.Pract. § 639a-3).

The "controversy" must necessarily be "of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts." *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 325, 56 S.Ct. 466, 473, 80 L.Ed. 688, 699 (1936). The existence or nonexistence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared. The petitioner must have a practical interest in the declaration sought and all parties having an interest therein or adversely affected must be made parties or be cited. A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case, but general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings.

When declaratory relief will not be effective in settling the controversy, the court may decline to grant it. But the fact that another remedy would be equally effective affords no ground for declining declaratory relief. The demand for relief shall state with precision the declaratory judgment desired, to which may be joined a demand for coercive relief, cumulatively or in the alternative; but when coercive relief only is sought but is deemed ungrantable or inappropriate, the court may *sua sponte*, if it serves a useful purpose, grant instead a declaration of rights. *Hasselbring* v. *Koepke*, 263 Mich. 466, 248 N.W. 869, 93 A.L.R. 1170 (1933). Written instruments, including ordinances and statutes, may be construed before or after breach at the petition of a properly interested party, process being served on the private parties or public officials interested. In other respects the Uniform Declaratory Judgment Act affords a guide to the scope and function of the Federal act. Compare *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617, 108 A.L.R. 1000 (1937); *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*, 288 U.S. 249, 53 S.Ct. 345, 77 L.Ed. 730, 87 A.L.R. 1191 (1933); *Gully, Tax Collector* v. *Interstate Natural Gas Co.*, 82 F.2d 145 (C.C.A.5th, 1936); *Ohio Casualty Ins. Co.* v. *Plummer*, 13 F.Supp. 169 (S.D.Tex., 1935); Borchard, Declaratory Judgments (1934), *passim*.

AMENDMENTS

1948—The amendment effective October 1949 substituted the reference to "Title 28, U.S.C., § 2201" in the first sentence for the reference to "Section 274(d) of the Judicial Code, as amended, U.S.C., Title 28, § 400".

CROSS REFERENCES

Answers to written interrogatories to jury, see rule 49.
Assignment of cases for trial, see rule 40.
Creation of remedy and further relief in declaratory judgment actions, see sections 2201 and 2202 of this title.
Jury trial and advisory jury, see rules 38 and 39.

Rule 58. Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

See Wis.Stat. (1935) § 270.31 (judgment entered forthwith on verdict of jury unless otherwise ordered), § 270.65 (where trial is by the court, entered by direction of the court), § 270.63 (entered by clerk on judgment on admitted claim for money). Compare 1 Idaho Code Ann. (1932) § 7-1101, and 4 Mont.Rev.Codes Ann. (1935) § 9403, which provides that judgment in jury cases be entered by clerk within 24 hours after verdict unless court otherwise directs. Conn. Practice Book (1934) § 200, provides that all judgments shall be entered within one week after rendition. In some States such as Washington, 2 Rev.Stat.Ann. (Remington, 1932) § 431, in jury cases the judgment is entered two days after the return of verdict to give time for making motion for new trial; § 435 (*ibid.*), provides that all judgments shall be entered by the clerk, subject to the court's direction.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. The reference to Rule 54(b) is made necessary by the amendment of that rule.

Two changes have been made in Rule 58 in order to clarify the practice. The substitution of the more inclusive phrase "all relief be denied" for the words "there be no recovery", makes it clear that the clerk shall enter the judgment forthwith in the situations specified without awaiting the filing of a formal judgment approved by the court. The phrase "all relief be denied" covers cases such as the denial of a bankrupt's discharge and similar situations where the relief sought is refused but there is literally no denial of a "recovery".

The addition of the last sentence in the rule emphasizes that judgments are to be entered promptly by

the clerk without waiting for the taxing of costs. Certain district court rules, for example, Civil Rule 22 of the Southern District of New York—until its annulment Oct. 1, 1945, for conflict with this rule—and the like rule of the Eastern District of New York, are expressly in conflict with this provision, although the federal law is of long standing and well settled. *Fowler* v. *Hamill*, 1891, 139 U.S. 549, 11 S.Ct. 663; *Craig* v. *The Hartford*, C.C.Cal. 1856, Fed.Cas.No. 3,333; *Tuttle* v. *Claflin*, C.C.A.2d, 1895, 60 Fed. 7, cert. den., 1897, 166 U.S. 721, 17 S.Ct. 992; *Prescott & A. C. Ry. Co.* v. *Atchison, T. & S. F.R. Co.*, C.C.A.2d, 1897, 84 Fed. 213; *Stallo* v. *Wagner*, C.C.A.2d, 1917, 245 Fed. 636, 639-40; *Brown* v. *Parker*, C.C.A.8th, 1899, 97 Fed. 446; *Allis-Chalmers* v. *United States*, C.C.A.7th, 1908, 162 Fed. 679. And this applies even though state law is to the contrary. *United States* v. *Nordbye*, C.C.A.8th, 1935, 75 F.2d 744, 746, cert. den., 1935, 296 U.S. 572, 56 S.Ct. 103. Inasmuch as it has been held that failure of the clerk thus enter judgment is a "misprision" "not to be excused, *The Washington*, C.C.A.2d, 1926, 16 F.2d 206, such a district court rule may have serious consequences for a district court clerk. Rules of this sort also provide for delay in entry of the judgment contrary to Rule 58. See *Commissioner of Internal Revenue* v. *Bedford's Estate*, 1945, 325 U.S. 283, 65 S.Ct. 1157.

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

Under the present rule a distinction has sometimes been made between judgments on general jury verdicts, on the one hand, and, on the other, judgments upon decisions of the court that a party shall recover only money or costs or that all relief shall be denied. In the first situation, it is clear that the clerk should enter the judgment without awaiting a direction by the court unless the court otherwise orders. In the second situation it was intended that the clerk should similarly enter the judgment forthwith upon the court's decision; but because of the separate listing in the rule, and the use of the phrase "upon receipt . . . of the direction," the rule has sometimes been interpreted as requiring the clerk to await a separate direction of the court. All these judgments are usually uncomplicated, and should be handled in the same way. The amended rule accordingly deals with them as a single group in clause (1) (substituting the expression "only a sum certain" for the present expression "only money"), and requires the clerk to prepare, sign, and enter them forthwith, without awaiting court direction, unless the court makes a contrary order. (The clerk's duty is ministerial and may be performed by a deputy clerk in the name of the clerk. See 28 U.S.C. § 956; cf. *Gilbertson* v. *United States*, 168 Fed. 672 (7th Cir. 1909).) The more complicated judgments described in clause (2) must be approved by the court before they are entered.

Rule 58 is designed to encourage all reasonable speed in formulating and entering the judgment when the case has been decided. Participation by the attorneys through the submission of forms of judgment involves needless expenditure of time and effort and promotes delay, except in special cases where counsel's assistance can be of real value. See *Matteson* v. *United States*, 240 F.2d 517, 518-19 (2d Cir. 1956). Accordingly, the amended rule provides that attorneys shall not submit forms of judgment unless directed to do so by the court. This applies to the judgments mentioned in clause (2) as well as clause (1).

Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion [for summary judgment] is granted," see *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 229, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958). Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running for postverdict motions and for the purpose of appeal. See id.; and compare *Blanchard* v. *Commonwealth Oil Co.*, 294 F.2d 834 (5th Cir. 1961); *United States* v. *Higginson*, 238 F.2d 439 (1st Cir. 1956); *Danzig* v. *Virgin Isle Hotel, Inc.*, 278 F.2d 580 (3d Cir. 1960); *Sears* v. *Austin*, 282 F.2d 340 (9th Cir. 1960), with *Matteson* v. *United States*, supra; *Erstling* v. *Southern Bell Tel. & Tel. Co.*, 255 F.2d 93 (5th Cir. 1958); *Barta* v. *Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), cert. denied, 358 U.S. 932, 79 S.Ct. 320, 3 L.Ed.2d 304 (1959); *Beacon Fed. S. & L. Assn.* v. *Federal Home L. Bank Bd.*, 266 F.2d 246 (7th Cir.), cert. denied, 361 U.S. 823, 80 S.Ct. 70, 4 L.Ed.2d 67 (1959); *Ram* v. *Paramount Film D. Corp.*, 278 F.2d 191 (4th Cir. 1960).

The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment. That judgments shall be on separate documents is also indicated in Rule 79(b); and see General Rule 10 of the U.S. District Courts for the Eastern and Southern Districts of New York; *Ram* v. *Paramount Film D. Corp.*, supra, at 194.

See the amendment of Rule 79(a) and the new specimen forms of judgment, Forms 31 and 32.

See also Rule 55(b)(1) and (2) covering the subject of judgments by default.

CROSS REFERENCES

General verdict accompanied by answers to interrogatories by jury, see rule 49.

Judgment for particular claim or counterclaim, see rule 54.

Notation of entry of judgment, see rule 79.

Notice of entry of judgment, see rule 77.

Time for new trial, see rule 59.

Rule 59. New Trials; Amendment of Judgments

(a) Grounds

A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for motion

A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for serving affidavits

When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court

Not later than 10 days after entry of judgment the court of its own initiative may order a

new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to alter or amend a judgment

A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule represents an amalgamation of the petition for rehearing of former Equity Rule 69 (Petition for Rehearing) and the motion for new trial of U.S.C., Title 28, formerly § 391 (now § 2111) (New trials; harmless error), made in the light of the experience and provision of the code States. Compare Calif.Code Civ.Proc. (Deering, 1937) §§ 656-663a, U.S.C., Title 28, formerly § 391 (now § 2111) (New trials; harmless error) is thus substantially continued in this rule. U.S.C., Title 28, former § 840 (Executions; stay on conditions) is modified insofar as it contains time provisions inconsistent with *Subdivision (b)*. For the effect of the motion for new trial upon the time for taking an appeal see *Morse* v. *United States*, 270 U.S. 151, 46 S.Ct. 241, 70 L.Ed. 518 (1926); *Aspen Mining and Smelting Co.* v. *Billings*, 150 U.S. 31, 14 S.Ct. 4, 37 L.Ed. 986 (1893).

For partial new trials which are permissible under *Subdivision (a)*, see *Gasoline Products Co., Inc.*, v. *Champlin Refining Co.*, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931); *Schuerholz* v. *Roach*, 58 F.2d 32 (C.C.A.4th, 1932); *Simmons* v. *Fish*, 210 Mass. 563, 97 N.E. 102, Ann.Cas.1912D, 588 (1912) (sustaining and recommending the practice and citing Federal cases and cases in accord from about sixteen States and *contra* from three States). The procedure in several States provides specifically for partial new trials. Ariz.Rev.Code Ann. (Struckmeyer, 1928) § 3852; Calif.Code Civ.Proc. (Deering, 1937) §§ 657, 662; Ill.Rev.Stat. (1937) ch. 110, § 216 (par. (f)); Md.Ann.Code (Bagby, 1924) Art. 5, §§ 25, 26; Mich.Court Rules Ann. (Searl, 1933) Rule 47, § 2; Miss.Sup.Ct. Rule 12, 161 Miss. 903, 905 (1931); N.J.Sup.Ct. Rules 131, 132, 147, 2 N.J.Misc. 1197, 1246-1251, 1255 (1924); 2 N.D.Comp.Laws Ann. (1913), § 7844, as amended by N.D.Laws 1927, ch. 214.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. Subdivision (b). With the time for appeal to a circuit court of appeals reduced in general to 30 days by the proposed amendment of Rule 73(a), the utility of the original "except" clause, which permits a motion for a new trial on the ground of newly discovered evidence to be made before the expiration of the time for appeal, would have been seriously restricted. It was thought advisable, therefore, to take care of this matter in another way. By amendment of Rule 60(b), newly discovered evidence is made the basis for relief from a judgment, and the maximum time limit has been extended to one year. Accordingly the amendment of Rule 59(b) eliminates the "except" clause and its specific treatment of newly discovered evidence as a ground for a motion for new trial. This ground remains, however, as a basis for a motion for new trial served not later than 10 days after the entry of judgment. See also Rule 60(b).

As to the effect of a motion under subdivision (b) upon the running of appeal time, see amended Rule 73(a) and Note.

Subdivision (e). This subdivision has been added to care for a situation such as that arising in *Boaz* v. *Mutual Life Ins. Co. of New York*, C.C.A.8th, 1944, 146 F.2d 321, and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry. The subdivision deals only with alteration or amendment of the original judgment in a case and does not relate to a judgment upon motion as provided in Rule 50(b). As to the effect of a motion under subdivision (e) upon the running of appeal time, see amended Rule 73(a) and Note.

The title of rule 59 has been expanded to indicate the inclusion of this subdivision.

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

By narrow interpretation of Rule 59(b) and (d), it has been held that the trial court is without power to grant a motion for a new trial, timely served, by an order made more than 10 days after the entry of judgment, based upon a ground not stated in the motion but perceived and relied on by the trial court sua sponte. *Freid* v. *McGrath*, 133 F.2d 350 (D.C.Cir. 1942); *National Farmers Union Auto. & Cas. Co.* v. *Wood*, 207 F.2d 659 (10th Cir. 1953); *Bailey* v. *Slentz*, 189 F.2d 406 (10th Cir. 1951); *Marshall's U.S. Auto Supply, Inc.* v. *Cashman*, 111 F.2d 140 (10th Cir. 1940), cert. denied, 311 U.S. 667 (1940); but see *Steinberg* v. *Indemnity Ins. Co.*, 36 F.R.D. 253 (E.D.La. 1964).

The result is undesirable. Just as the court has power under Rule 59(d) to grant a new trial of its own initiative within the 10 days, so it should have power, when an effective new trial motion has been made and is pending, to decide it on grounds thought meritorious by the court although not advanced in the motion. The second sentence added by amendment to Rule 59(d) confirms the court's power in the latter situation, with provision that the parties be afforded a hearing before the power is exercised. See 6 Moore's Federal Practice, par. 59.09[2] (2d ed. 1953).

In considering whether a given ground has or has not been advanced in the motion made by the party, it should be borne in mind that the particularity called for in stating the grounds for a new trial motion is the same as that required for all motions by Rule 7(b)(1). The latter rule does not require ritualistic detail but rather a fair indication to court and counsel of the substance of the grounds relied on. See *Lebeck* v. *William A. Jarvis Co.*, 250 F.2d 285 (3d Cir. 1957); *Tsai* v. *Rosenthal*, 297 F.2d 614 (8th Cir. 1961); *General Motors Corp.* v. *Perry*, 303 F.2d 544 (7th Cir. 1962); *cf. Grimm* v. *California Spray-Chemical Corp.*, 264 F.2d 145 (9th Cir. 1959); *Cooper* v. *Midwest Feed Products Co.*, 271 F.2d 177 (8th Cir. 1959).

CROSS REFERENCES

Answers to written interrogatories inconsistent with general verdict, as ground for ordering new trial, see rule 49.

Court of Claims, grounds for new trial, see section 2515 of this title.

Disability of judge preventing performance of duties as ground for new trial, see rule 63.

Extension of time for motion, see rule 6.

Harmless error not ground for new trial, see rule 61.

Joinder of motion with motion to set aside verdict or judgment on motion for directed verdict, see rule 50.

Motion to amend findings or make additional findings, see rule 52.

Stay of execution or proceedings to enforce judgment on motion for new trial, see rule 62.

Rule 60. Relief From Judgment or Order

(a) Clerical mistakes

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may

be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). See former Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); Mich.Court Rules Ann. (Searl, 1933) Rule 48, § 3; 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 464(3); Wyo.Rev.Stat.Ann. (Courtright, 1931) § 89-2301(3). For an example of a very liberal provision for the correction of clerical errors and for amendment after judgment, see Va.Code Ann. (Michie, 1936) §§ 6329, 6333.

Note to Subdivision (b). Application to the court under this subdivision does not extend the time for taking an appeal, as distinguished from the motion for new trial. This section is based upon Calif.Code Civ.Proc. (Deering, 1937) § 473. See also N.Y.C.P.A. (1937) § 108; 2 Minn.Stat. (Mason, 1927) § 9283.

For the independent action to relieve against mistake, etc., see Dobie, Federal Procedure, pages 760-765, compare 639; and Simkins, Federal Practice, ch. CXXI (pp. 820-830) and ch. CXXII (pp. 831-834), compare § 214.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. Subdivision (a). The amendment incorporates the view expressed in *Perlman* v. *322 West Seventy-Second Street Co., Inc.*, C.C.A.2d, 1942, 127 F.2d 716; 3 Moore's Federal Practice, 1938, 3276, and further permits correction after docketing, with leave of the appellate court. Some courts have thought that upon the taking of an appeal the district court lost its power to act. See *Schram* v. *Safety Investment Co.*, E.D.Mich. 1942, 45 F.Supp. 636; also *Miller* v. *United States*, C.C.A.7th, 1940, 114 F.2d 267.

Subdivision (b). When promulgated, the rules contained a number of provisions, including those found in Rule 60(b), describing the practice by a motion to obtain relief from judgments, and these rules, coupled with the reservation in Rule 60(b) of the right to entertain a new action to relieve a party from a judgment, were generally supposed to cover the field. Since the rules have been in force, decisions have been rendered that the use of bills of review, coram nobis, or audita querela, to obtain relief from final judgments is still proper, and that various remedies of this kind still exist although they are not mentioned in the rules and the practice is not prescribed in the rules. It is obvious that the rules should be complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments. For extended discussion of the old common law writs and equitable remedies, the interpretation of Rule 60, and proposals for change, see Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623. See also 3 Moore's Federal Practice, 1938, 3254 et seq.; Commentary, Effect of Rule 60b on Other Methods of Relief From Judgment, 1941, 4 Fed.Rules Serv. 942, 945; *Wallace* v. *United States*, C.C.A.2d, 1944, 142 F.2d 240, cert. den., 1944, 323 U.S. 712, 65 S.Ct. 37.

The reconstruction of Rule 60(b) has for one of its purposes a clarification of this situation. Two types of procedure to obtain relief from judgments are specified in the rules as it is proposed to amend them. One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment. Various rules, such as the one dealing with a motion for new trial and for amendment of judgments, Rule 59, one for amended findings, Rule 52, and one for judgment notwithstanding the verdict, Rule 50(b), and including the provisions of Rule 60(b) as amended, prescribe the various types of cases in which the practice by motion is permitted. In each case there is a limit upon the time within which resort to a motion is permitted, and this time limit may not be enlarged under Rule 6(b). If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action. Where the independent action is resorted to, the limitations of time are those of laches or statutes of limitations. The Committee has endeavored to ascertain all the remedies and types of relief heretofore available by coram nobis, coram vobis, audita querela, bill of review, or bill in the nature of a bill of review. See Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623, 659-682. It endeavored then to amend the rules to permit, either by motion or by independent action, the granting of various kinds of relief from judgments which were permitted in the federal courts prior to the adoption of these rules, and the amendment concludes with a provision abolishing the use of bills of review and the other common law writs referred to, and requiring the practice to be by motion or by independent action.

To illustrate the operation of the amendment, it will be noted that under Rule 59(b) as it now stands, without amendment, a motion for new trial on the ground of newly discovered evidence is permitted within ten days after the entry of the judgment, or after that time upon leave of the court. It is proposed to amend Rule 59(b) by providing that under that rule a motion for new trial shall be served not later than ten days after the entry of the judgment, whatever the ground be for the motion, whether error by the court or newly discovered evidence. On the other hand, one of

the purposes of the bill of review in equity was to afford relief on the ground of newly discovered evidence long after the entry of the judgment. Therefore, to permit relief by a motion similar to that heretofore obtained on bill of review, Rule 60(b) as amended permits an application for relief to be made by motion, on the ground of newly discovered evidence, within one year after judgment. Such a motion under Rule 60(b) does not affect the finality of the judgment, but a motion under Rule 59, made within 10 days, does affect finality and the running of the time for appeal.

If these various amendments, including principally those to Rule 60(b), accomplish the purpose for which they are intended, the federal rules will deal with the practice in every sort of case in which relief from final judgments is asked, and prescribe the practice. With reference to the question whether, as the rules now exist, relief by coram nobis, bills of review, and so forth, is permissible, the generally accepted view is that the remedies are still available, although the precise relief obtained in a particular case by use of these ancillary remedies is shrouded in ancient lore and mystery. See *Wallace* v. *United States,* C.C.A.2d, 1944, 142 F.2d 240, cert. den., 1944, 323 U.S. 712, 65 S.Ct. 37; *Fraser* v. *Doing,* App.D.C. 1942, 130 F.2d 617; *Jones* v. *Watts, C.C.A.5th, 1944, 142 F.2d 575; Preveden* v. *Hahn,* S.D.N.Y. 1941, 36 F.Supp. 952; *Cavallo* v. *Agwilines, Inc.,* S.D.N.Y. 1942, 6 Fed.Rules Serv. 60b.31, Case 2, 2 F.R.D. 526; *McGinn* v. *United States,* D.Mass. 1942, 6 Fed.Rules Serv. 60b.51, Case 3, 2 F.R.D. 562; *City of Shattuck, Oklahoma ex rel. Versluis* v. *Oliver,* W.D.Okla. 1945, 8 Fed.Rules Serv. 60b.31, Case 3; Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623, 631-653; 3 Moore's Federal Practice, 1938, 3254 et seq.; Commentary, Effect of Rule 60b on Other Methods of Relief from Judgment, op. cit. supra. Cf. *Norris* v. *Camp,* C.C.A.10th, 1944, 144 F.2d 1; *Reed* v. *South Atlantic Steamship Co. of Delaware,* D.Del. 1942, 2 F.R.D. 475, 6 Fed.Rules Serv. 60b.31, Case 1; *Laughlin* v. *Berens,* D.D.C. 1945, 8 Fed.Rules Serv. 60b.51, Case 1, 73 W.L.R. 209.

The transposition of the words "the court" and the addition of the word "and" at the beginning of the first sentence are merely verbal changes. The addition of the qualifying word "final" emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief; and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires.

The qualifying pronoun "his" has been eliminated on the basis that it is too restrictive, and that the subdivision should include the mistake or neglect of others which may be just as material and call just as much for supervisory jurisdiction as where the judgment is taken against the party through *his* mistake, inadvertence, *etc.*

Fraud, whether intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party are express grounds for relief by motion under amended subdivision (b). There is no sound reason for their exclusion. The incorporation of fraud and the like within the scope of the rule also removes confusion as to the proper procedure. It has been held that relief from a judgment obtained by extrinsic fraud could be secured by motion within a "reasonable time," which might be after the time stated in the rule had run. *Fiske* v. *Buder,* (C.C.A.8th, 1942), 125 F.2d 841; see also inferentially *Bucy* v. *Nevada Construction Co.,* (C.C.A.9th, 1942), 125 F.2d 213. On the other hand, it has been suggested that in view of the fact that fraud was omitted from original Rule 60(b) as a ground for relief, an independent action was the only proper remedy. Commentary, Effect of Rule 60b on Other Methods of Relief From Judgment, 1941, 4 Fed.Rules Serv. 942, 945. The amendment settles this problem by making fraud an express ground for relief by motion; and under the saving clause, fraud may be urged as a basis for relief by independent action insofar as established doctrine permits. See Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623, 653-659; 3 Moore's Federal Practice, 1938, 3267 et seq. And the rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause. As an illustration of this situation, see *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.,* 1944, 322 U.S. 238, 64 S.Ct. 997.

The time limit for relief by motion in the court and in the action in which the judgment was rendered has been enlarged from six months to one year.

It should be noted that Rule 60(b) does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief. It should also be noted that under § 200(4) of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix, § 501 et seq. [§ 520(4)], a judgment rendered in any action or proceeding governed by the section may be vacated under certain specified circumstances upon proper application to the court.

AMENDMENTS

1948—The amendment effective October 1949 substituted the reference to "Title 28, U.S.C., § 1655" in the next to the last sentence of subdivision (b), for the reference to "Section 57 of the Judicial Code, U.S.C., Title 28, § 118".

CROSS REFERENCES

Enlargement of time under this rule prohibited, see rule 6.

Power of court unaffected by expiration of term, see rule 6.

Stay of proceedings pending disposition of motion under this rule, see rule 62.

Time for motion for new trial, see rule 59.

Rule 61. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

NOTES OF ADVISORY COMMITTEE ON RULES

A combination of U.S.C., Title 28, former § 391 (now § 2111) (New trials; harmless error) and former § 777 (Defects of form; amendments) with modifications. See *McCandless* v. *United States,* 298 U.S. 342, 56 S.Ct. 764, 80 L.Ed. 1205 (1936). Compare former Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); and last sentence of former Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). For the last sentence see the last sentence of former Equity Rule 19 (Amendments Generally).

CROSS REFERENCES

Admissibility of evidence generally, see rule 43.

Formal exceptions unnecessary, see rule 46.

Grounds for new trial, rule 59.

Harmless error on appeal or certiorari, see section 2111 of this title.

Instructions to jury, see rule 51.

Motion for judgment notwithstanding verdict, see rule 50.

Motion to vacate judgment or order, see rule 60.

Power of appellate court to affirm, modify, reverse, and remand case, see section 2106 of this title.

FEDERAL RULES OF CRIMINAL PROCEDURE

Grounds for new trial, see rule 33, Title 18, Appendix, Crimes and Criminal Procedure.
Harmless and plain error, see rule 52.

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic stay; exceptions—Injunctions, receiverships, and patent accountings

Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) Stay on motion for new trial or for judgment

In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) Injunction pending appeal

When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

(d) Stay upon appeal

When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(e) Stay in favor of the United States or agency thereof

When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) Stay according to State law

In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded him had the action been maintained in the courts of that state.

(g) Power of appellate court not limited

The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) Stay of judgment as to multiple claims or multiple parties

When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 17, 1961, eff. July 19, 1961.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). The first sentence states the substance of the last sentence of U.S.C., Title 28, former § 874 (Supersedeas). The remainder of the subdivision states the substance of the last clause of U.S.C., Title 28, former § 227 (Appeals in proceedings for injunctions; receivers; and admiralty), and of former § 227a (now §§ 1292, 2107) (Appeals in suits in equity for infringement of letters patent for inventions; stay of proceedings for accounting), but extended to include final as well as interlocutory judgments.

Note to Subdivision (b). This modifies U.S.C., Title 28, former § 840 (Executions; stay on conditions).

Note to Subdivision (c). Compare former Equity Rule 74 (Injunction Pending Appeal); and *Cumberland Telephone and Telegraph Co.* v. *Louisiana Public Service Commission*, 260 U.S. 212, 43 S.Ct. 75, 67 L.Ed. 217 (1922). See Simkins, Federal Practice (1934) § 916 in regard to the effect of appeal on injunctions and the giving of bonds. See U.S.C., Title 6 (Official and Penal Bonds) for bonds by surety companies. For statutes providing for a specially constituted district court of three judges, see:

U.S.C., Title 7:
- § 217 (Proceedings for suspension of orders of Secretary of Agriculture under Stockyards Act)—by reference.
- § 499k (Injunctions; application of injunction laws governing orders of Interstate Commerce Commission to orders of Secretary of Agriculture under Perishable Commodities Act)—by reference.

U.S.C., Title 15:
- § 28 (Antitrust laws; suits against monopolies expedited)

U.S.C., Title 28, former:
- § 47 (Injunctions as to orders of Interstate Commerce Commission, etc.)

§ 380 (Injunctions; alleged unconstitutionality of State statutes.)
§ 380a (Same; constitutionality of federal statute)

U.S.C., Title 49:
§ 44 (Suits in equity under interstate commerce laws; expedition of suits)

Note to Subdivision (d). This modifies U.S.C., Title 28, former § 874 (Supersedeas). See Rule 36(2), Rules of the Supreme Court of the United States, which governs supersedeas bonds on direct appeals to the Supreme Court, and Rule 73(d), of these rules, which governs supersedeas bonds on appeals to a circuit court of appeals. The provisions governing supersedeas bonds in both kinds of appeals are substantially the same.

Note to Subdivision (e). This states the substance of U.S.C., Title 28, formerly § 870 (now § 2408) (Bond; not required of the United States).

Note to Subdivision (f). This states the substance of U.S.C., Title 28, former § 841 (Executions; stay of one term) with appropriate modification to conform to the provisions of Rule 6(c) as to terms of court.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. Subdivision (a). [This subdivision not amended]. Sections 203 and 204 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix, § 501 et seq. [§§ 523, 524], provide under certain circumstances for the issuance and continuance of a stay of execution of any judgment or order entered against a person in military service. See *Bowsman* v. *Peterson*, D.Neb. 1942, 45 F.Supp. 741. Section 201 of the Act [50 U.S.C. App. § 521] permits under certain circumstances the issuance of a stay of any action or proceeding at any stage thereof, where either the plaintiff or defendant is a person in military service. See also Note to Rule 64 herein.

Subdivision (b). This change was necessary because of the proposed addition to Rule 59 of subdivision (e).

Subdivision (h). In proposing to revise Rule 54(b), the Committee thought it advisable to include a separate provision in Rule 62 for stay of enforcement of a final judgment in cases involving multiple claims.

AMENDMENTS

1961—The amendment adopted Apr. 17, 1961, eliminated words "on some but not all of the claims presented in the action" which followed "final judgment".

1948—The amendment effective October 1949 deleted at the end of subdivision (g) the following language which originally appeared after the word "entered": "and these rules do not supersede the provisions of Section 210 of the Judicial Code, as amended, U.S.C., Title 28, former § 47a, or of other statutes of the United States to the effect that stays pending appeals to the Supreme Court may be granted only by that court or a justice thereof."

CROSS REFERENCES

Deposit of bonds or notes of United States in lieu of surety, see section 15 of Title 6, Surety Bonds.
Execution, see rule 69.
Security not required of United States, see section 2408 of this title.

Rule 63. Disability of a Judge

If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule adapts and extends the provisions of U.S.C., Title 28, former § 776 (Bill of exceptions; authentication; signing of by judge) to include all duties to be performed by the judge after verdict or judgment. The statute is therefore superseded.

CROSS REFERENCES

Findings of fact and conclusions of law, see rule 52.
New trial, see rule 59.

FEDERAL RULES OF CRIMINAL PROCEDURE

Disability of judge, see rule 25, Title 18, Appendix, Crimes and Criminal Procedure.

TITLE VIII—PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Rule 64. Seizure of Person or Property

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule adopts the existing Federal law, except that it specifies the applicable State law to be that of the time when the remedy is sought. Under U.S.C., Title 28, former § 726 (Attachments as provided by State laws) the plaintiff was entitled to remedies by attachment or other process which were on June 1, 1872, provided by the applicable State law, and the district courts might, from time to time, by general rules, adopt such State laws as might be in force. This statute is superseded as are district court rules which are rendered unnecessary by the rule.

Lis pendens. No rule concerning *lis pendens* is stated, for this would appear to be a matter of substantive law affecting State laws of property. It has been held that in the absence of a State statute expressly providing for the recordation of notice of the pendency of Federal actions, the commencement of a Federal action is notice to all persons affected. *King* v. *Davis*, 137 Fed. 198 (W.D.Va., 1903). It has been held, however, that when a State statute does so provide expressly, its provisions are binding. *United States* v. *Calcasieu Timber Co.*, 236 Fed. 196 (C.C.A.5th, 1916).

For statutes of the United States on attachment, see e. g.:

U.S.C., Title 28, former:
§ 737 (Attachment in postal suits)
§ 738 (Attachment; application for warrant)
§ 739 (Attachment; issue of warrant)
§ 740 (Attachment; trial of ownership of property)

§ 741 (Attachment; investment of proceeds of attached property)
§ 742 (Attachment; publication of attachment)
§ 743 (Attachment; personal notice of attachment)
§ 744 (Attachment; discharge; bond)
§ 745 (Attachment; accrued rights not affected)
§ 746 (Attachments dissolved in conformity with State laws)

For statutes of the United States on garnishment, see e.g.:
U.S.C., Title 28, former:
§ 748 (Garnishees in suits by United States against a corporation)
§ 749 (Same; issue tendered on denial of indebtedness)
§ 750 (Same; garnishee failing to appear)

For statutes of the United States on arrest, see e.g.:
U.S.C., Title 28, former:
§ 376 (Writs of ne exeat)
§ 755 (Special bail in suits for duties and penalties)
§ 756 (Defendant giving bail in one district and committed in another)
§ 757 (Defendant giving bail in one district and committed in another; defendant held until judgment in first suit)
§ 758 (Bail and affidavits; taking by commissioners)
§ 759 (Calling of bail in Kentucky)
§ 760 (Clerks may take bail de bene esse)
§ 843 (Imprisonment for debt)
§ 844 (Imprisonment for debt; discharge according to State laws)
§ 845 (Imprisonment for debt; jail limits)

For statutes of the United States on replevin, see, e.g.:
U.S.C., Title 28, former:
§ 747 (Replevy of property taken under revenue laws)

SUPPLEMENTARY NOTE OF ADVISORY COMMITTEE REGARDING THIS RULE

Note. Sections 203 and 204 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix, § 501 et seq. [§§ 523, 524], provide under certain circumstances for the issuance and continuance of a stay of the execution of any judgment entered against a person in military service, or the vacation or stay of any attachment or garnishment directed against such person's property, money, or debts in the hands of another. See also Note to Rule 62 herein.

CROSS REFERENCES

Execution, see rule 69.

Rule 65. Injunctions

(a) Preliminary injunction

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

(b) Temporary restraining order; notice; hearing; duration

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rnle.

(d) Form and scope of injunction or restraining order

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Employer and employee; interpleader; constitutional cases

These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C. § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C. § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivisions (a) and (b). These are taken from U.S.C., Title 28, former § 381 (Injunctions; preliminary injunctions and temporary restraining orders).

Note to Subdivision (c). Except for the last sentence, this is substantially U.S.C., Title 28, former § 382 (Injunctions; security on issuance of). The last sentence continues the following and similar statutes which expressly except the United States or an officer or agency thereof from such security requirements: U.S.C., Title 15, §§ 77t(b), 78u(e), and 79r(f) (Securities and Exchange Commission). It also excepts the United States or an officer or agency thereof from such security requirements in any action in which a restraining order or interlocutory judgment of injunction issues in its favor whether there is an express statutory exception from such security requirements or not.

See U.S.C., Title 6 (Official and Penal Bonds) for bonds by surety companies.

Note to Subdivision (d). This is substantially U.S.C., Title 28, former § 383 (Injunctions; requisites of order; binding effect).

Note to Subdivision (e). The words "relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee" are words of description and not of limitation.

Compare former Equity Rule 73 (Preliminary Injunctions and Temporary Restraining Orders) which is substantially equivalent to the statutes.

For other statutes dealing with injunctions which are continued, see e.g.:

U.S.C., Title 28, former:

§ 46	(Suits to enjoin orders of Interstate Commerce Commission to be against United States)
§ 47	(Injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court; time for taking)
§ 378	(Injunctions; when granted)
§ 379	(Injunctions; stay in State courts)
§ 380	(Injunctions; alleged unconstitutionality of State statutes; appeal to Supreme Court)
§ 380a	(Injunctions; constitutionality of Federal statute; application for hearing; appeal to Supreme Court)

U.S.C., Title 7:

§ 216	(Court proceedings to enforce orders; injunction)
§ 217	(Proceedings for suspension of orders)

U.S.C., Title 15:

§ 4	(Jurisdiction of courts; duty of district attorney; procedure)
§ 25	(Restraining violations; procedure)
§ 26	(Injunctive relief for private parties; exceptions)
§ 77t(b)	(Injunctions and prosecution of offenses)

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. It has been held that in actions on preliminary injunction bonds the district court has discretion to grant relief in the same proceeding or to require the institution of a new action on the bond. *Russell* v. *Farley,* 1881, 105 U.S. 433, 466. It is believed, however, that in all cases the litigant should have a right to proceed on the bond in the same proceeding, in the manner provided in Rule 73(f) for a similar situation. The paragraph added to Rule 65(c) insures this result and is in the interest of efficiency. There is no reason why Rules 65(c) and 73(f) should operate differently. Compare § 50, sub. n of the Bankruptcy Act, 11 U.S.C. § 78, sub. n, under which actions on all bonds furnished pursuant to the Act may be proceeded upon summarily in the bankruptcy court. See 2 Collier on Bankruptcy, 14th ed. by Moore and Oglebay, 1853-1854.

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

Subdivision (a)(2). This new subdivision provides express authority for consolidating the hearing of an application for a preliminary injunction with the trial on the merits. The authority can be exercised with particular profit when it appears that a substantial part of evidence offered on the application will be relevant to the merits and will be presented in such form as to qualify for admission on the trial proper. Repetition of evidence is thereby avoided. The fact that the proceedings have been consolidated should cause no delay in the disposition of the application for the preliminary injunction, for the evidence will be directed in the first instance to that relief, and the preliminary injunction, if justified by the proof, may be issued in the course of the consolidated proceedings. Furthermore, to consolidate the proceedings will tend to expedite the final disposition of the action. It is believed that consolidation can be usefully availed of in many cases.

The subdivision further provides that even when consolidation is not ordered, evidence received in connection with an application for a preliminary injunction for a preliminary injunction which would be admissible on the trial on the merits forms part of the trial record. This evidence need not be repeated on the trial. On the the other hand, repetition is not altogether prohibited. That would be impractical and unwise. For example, a witness testifying comprehensively on the trial who has previously testified upon the application for a preliminary injunction might sometimes be hamstrung in telling his story if he could not go over some part of his prior testimony to connect it with his present testimony. So also, some repetition of testimony may be called for where the trial is conducted by a judge who did not hear the application for the preliminary injunction. In general, however, repetition can be avoided with an increase of efficiency in the conduct of the case and without any distortion of the presentation of evidence by the parties.

Since an application for a preliminary injunction may be made in an action in which, with respect to all or part of the merits, there is a right to trial by jury, it is appropriate to add the caution appearing in the last sentence of the subdivision. In such a case the jury will have to hear all the evidence bearing on its verdict, even if some part of the evidence has already been heard by the judge alone on the application for the preliminary injunction.

The subdivision is believed to reflect the substance of the best current practice and introduces no novel conception.

Subdivision (b). In view of the possibly drastic consequence of a temporary restraining order, the opposition should be heard, if feasible, before the order is granted. Many judges have properly insisted that, when time does not permit of formal notice of the application to the adverse party, some expedient, such as telephonic notice to the attorney for the adverse

party, be resorted to if this can reasonably be done. On occasion, however, temporary restraining orders have been issued without any notice when it was feasible for some fair, although informal, notice to be given. See the emphatic criticisms in *Pennsylvania Rd. Co.* v. *Transport Workers Union*, 278 F.2d 693, 694 (3d Cir. 1960); *Arvida Corp. v. Sugarman*, 259 F.2d 428, 429 (2d Cir. 1958); *Lummus Co.* v. *Commonwealth Oil Ref. Co., Inc.*, 297 F.2d 80, 83 (2d Cir. 1961), cert. denied, 368 U.S. 986 (1962).

Heretofore the first sentence of subdivision (b), in referring to a notice "served" on the "adverse party" on which a "hearing" could be held, perhaps invited the interpretation that the order might be granted without notice if the circumstances did not permit of a formal hearing on the basis of a formal notice. The subdivision is amended to make it plain that informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all.

Before notice can be dispensed with, the applicant's counsel must give his certificate as to any efforts made to give notice and the reasons why notice should not be required. This certificate is in addition to the requirement of an affidavit or verified complaint setting forth the facts as to the irreparable injury which would result before the opposition could be heard.

The amended subdivision continues to recognize that a temporary restraining order may be issued without any notice when the circumstances warrant.

Subdivision (c). Original Rules 65 and 73 contained substantially identical provisions for summary proceedings against sureties on bonds required or permitted by the rules. There was fragmentary coverage of the same subject in the Admiralty Rules. Clearly, a single comprehensive rule is required, and is incorporated as Rule 65.1.

AMENDMENTS

1948—The amendment effective October 1949, changed subdivision (e) in the following respects: in the first clause the amendment substituted the words "any statute of the United States" for the words "the Act of October 15, 1914, ch. 323, §§ 1 and 20 (38 Stat. 730), U.S.C., Title 29, §§ 52 and 53, or the Act of March 23, 1932, ch. 90 (47 Stat. 70), U.S.C., Title 29, ch. 6"; in the second clause of subdivision (e) the amendment substituted the reference to "Title 28, U.S.C., § 2361" for the reference to "Section 24(26) of the Judicial Code as amended, U.S.C., Title 28, § 41(26)"; and the third clause was amended to read "Title 28, U.S.C., § 2284," etc., as at present, instead of "the Act of August 24, 1937, ch. 754, § 3, relating to actions to enjoin the enforcement of acts of Congress."

CROSS REFERENCES

Anti-trust laws, restraining violation, see section 4 of Title 15, Commerce and Trade.

Appeals—

District Courts to courts of appeals, see section 1292 of this title.

Injunction pending, see rule 62.

Interlocutory orders of district courts to courts of appeals, see section 1292 of this title.

Appellate court's power to suspend, modify or grant pending appeal, see rule 62.

Atomic Energy Act, enjoining violation of act or regulation, see section 2280 of Title 42, The Public Health and Welfare.

Bond for injunction pending appeal, see rule 62.

Clayton Act, violation of, see sections 25, 26 of Title 15, Commerce and Trade.

Copyrights, injunction against infringement, see section 101 of Title 17, Copyrights.

Fair Labor Standards Act, restraint of violations of regulations, see section 217 of Title 29, Labor.

Findings of fact and conclusions of law, necessity for, see rule 52.

Internal revenue, prohibition of suits to restrain assessment or collection, see section 7421 of Title 26, Internal Revenue Code.

Labor-Management Relations Act—

Petition by Attorney General to enjoin strike or lockout, see section 178 of Title 29, Labor.

Restraining unfair labor practices, see sections 160, 161 of Title 29.

Patent infringement, see section 283 of Title 35, Patents.

Securities Act, actions to restrain violations, see section 77t of Title 15, Commerce and Trade.

Securities Exchange Act, restraint of violations, see section 78u of Title 15.

Three-Judge Court, composition of, see section 2284 of this title.

Trade-marks and trade-names, infringement, see section 78u of Title 15, Commerce and Trade.

Rule 65.1. Security: Proceedings Against Sureties

Whenever these rules, including the Supplemental Rules for Certain Admiralty and Marine Claims, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

(Added Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

See Note to Rule 65.

Rule 66. Receivers Appointed by Federal Courts

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.)

NOTES OF ADVISORY COMMITTEE ON AMENDMENTS TO RULES

Note. The title of Rule 66 has been expanded to make clear the subject of the rule, i.e., federal equity receivers.

The first sentence added to Rule 66 prevents a dismissal by any party, after a federal equity receiver has been appointed, except upon leave of court. A party should not be permitted to oust the court and its officer without the consent of that court. See Civil Rule 31(e), Eastern District of Washington.

The second sentence added at the beginning of the rule deals with suits by or against a federal equity receiver. The first clause thereof eliminates the formal ceremony of an ancillary appointment before suit can be brought by a receiver, and is in accord with the more modern state practice, and with more expeditious and less expensive judicial administration. 2 Moore's Federal Practice, 1938, 2088-2091. For the rule necessitating ancillary appointment, see *Sterrett* v. *Second Nat. Bank*, 1918, 248 U.S. 73, 39 S.Ct. 27; *Kelley*

v. *Queeney*, W.D.N.Y. 1941, 41 F.Supp. 1015; see also *McCandless* v. *Furlaud*, 1934, 293 U.S. 67, 55 S.Ct. 42. This rule has been extensively criticized. First, Extraterritorial Powers of Receivers, 1932, 27 Ill.L.Rev. 271; Rose, Extraterritorial Actions by Receivers, 1933, 17 Minn.L.Rev. 704; Laughlin, The Extraterritorial Powers of Receivers, 1932, 45 Harv.L.Rev. 429; Clark and Moore, A New Federal Civil Procedure—II, Pleadings and Parties, 1935, 44 Yale L.J. 1291, 1312-1315; Note, 1932, 30 Mich.L.Rev. 1322. See also comment in *Bicknell* v. *Lloyd-Smith*, C.C.A.2d, 1940, 109 F.2d 527, cert. den., 1940, 311 U.S. 650, 61 S.Ct. 15. The second clause of the sentence merely incorporates the well-known and general rule that, absent statutory authorization, a federal receiver cannot be sued without leave of the court which appointed him, applied in the federal courts since *Barton* v. *Barbour*, 1881, 104 U.S. 126. See also 1 Clark on Receivers, 2d ed., § 549. Under 28 U.S.C. § 125 leave of court is unnecessary when a receiver is sued "in respect of any act or transaction of his in carrying on the business" connected with the receivership property, but such suit is subject to the general equity jurisdiction of the court in which the receiver was appointed, so far as justice necessitates.

Capacity of a state court receiver to sue or be sued in federal court is governed by Rule 17(b).

The last sentence added to Rule 66 assures the application of the rules in all matters except actual administration of the receivership estate itself. Since this implicitly carries with it the applicability of those rules relating to appellate procedure, the express reference thereto contained in Rule 66 has been stricken as superfluous. Under Rule 81(a)(1) the rules do not apply to bankruptcy proceedings except as they may be made applicable by order of the Supreme Court. Rule 66 is applicable to what is commonly known as a federal "chancery" or "equity" receiver, or similar type of court officer. It is not designed to regulate or affect receivers in bankruptcy, which are governed by the Bankruptcy Act and the General Orders. Since the Federal Rules are applicable in bankruptcy by virtue of General Orders in Bankruptcy 36 and 37 [following section 53 of Title 11, U.S.C.] only to the extent that they are not inconsistent with the Bankruptcy Act or the General Orders, Rule 66 is not applicable to bankruptcy receivers. See 1 Collier on Bankruptcy, 14th ed. by Moore and Oglebay, ¶¶ 2.23-2.36.

AMENDMENTS

1948—The amendment effective October 1949 deleted a sentence which formerly appeared immediately following the first sentence and which read as follows: "A receiver shall have the capacity to sue in any district court without ancillary appointment; but actions against a receiver may not be commenced without leave of the court appointing him except when authorized by a statute of the United States."

CROSS REFERENCES

Receiver suable without leave of court, see section 959 of this title.

Rule 67. Deposit in Court

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U.S.C., §§ 2041, and 2042; the Act of June 26, 1934, ch. 756, § 23, as amended (48 Stat. 1236, 58 Stat. 845), U.S.C. Title 31, § 725v; or any like statute.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule provides for deposit in court generally, continuing similar special provisions contained in such statutes as U.S.C., Title 28, formerly § 41(26) (now §§ 1335, 1397, 2361) (Original jurisdiction of bills of interpleader, and of bills in the nature of interpleader). See generally *Howard* v. *United States*, 184 U.S. 676, 22 S.Ct. 543, 46 L.Ed. 754 (1902); United States Supreme Court Admiralty Rules (1920), Rules 37 (Bringing Funds into Court), 41 (Funds in Court Registry), and 42 (Claims Against Proceeds in Registry). With the first sentence, compare English Rules Under the Judicature Act (The Annual Practice, 1937) O. 22, r. 1(1).

AMENDMENTS

1948—The amendment effective October 1949 substituted the reference to "Title 28, U.S.C.A. §§ 2041, and 2042" for the reference to "Sections 995 and 996, Revised Statutes, as amended, U.S.C.A., Title 28, §§ 851, 852." The amendment also added the words "as amended" following the citation of the Act of June 26, 1934, ch. 756, § 23, and in the parenthetical citation immediately following, added the reference to "58 Stat. 845".

Rule 68. Offer of Judgment

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior the commencement of hearings to determine the amount or extent of liability.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

See 2 Minn. Stat. (Mason, 1927) § 9323; 4 Mont. Rev. Codes Ann. (1935) § 9770; N.Y.C.P.A. (1937) § 177.

For the recovery of costs against the United States, see Rule 54(d).

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. The third sentence of Rule 68 has been altered to make clear that evidence of an unaccepted offer is admissible in a proceeding to determine the costs of the action but is not otherwise admissible.

The two sentences substituted for the deleted last sentence of the rule assure a party the right to make a second offer where the situation permits—as, for ex-

ample, where a prior offer was not accepted but the plaintiff's judgment is nullified and a new trial ordered, whereupon the defendant desires to make a second offer. It is implicit, however, that as long as the case continues—whether there be a first, second or third trial—and the defendant makes no further offer, his first and only offer will operate to save him the costs from the time of that offer if the plaintiff ultimately obtains a judgment less than the sum offered. In the case of successive offers not acccpted, the offeror is saved the costs incurred after the making of the offer which was equal to or greater than the judgment ultimately obtained. These provisions should serve to encourage settlements and avoid protracted litigation.

The phrase "before the trial begins", in the first sentence of the rule, has been construed in *Cover* v. *Chicago Eye Shield Co.*, C.C.A.7th, 1943, 136 F.2d 374, cert. den. 1943, 320 U.S. 749, 64 S.Ct. 53.

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

This logical extension of the concept of offer of judgment is suggested by the common admiralty practice of determining liability before the amount of liability is determined.

Rule 69. Execution

(a) In general

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

(b) Against certain public officers

When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Title 28, U.S.C. § 2006, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, ch. 130, § 8 (18 Stat. 401), U.S.C., Title 2, § 118, and when the court has given the certificate of probable cause for his act as provided in those statutes, execution shall not issue against the officer or his property but the final judgment shall be satisfied as provided in such statutes.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). This follows in substance U.S.C., Title 28, former § 727 (Executions as provided by State laws) and former § 729 (Proceedings in vindication of civil rights), except that, as in the similar case of attachments (see note to Rule 64), the rule specifies the applicable State law to be that of the time when the remedy is sought, and thus renders unnecessary, as well as supersedeas, local district court rules.

Statutes of the United States on execution, when applicable, govern under this rule. Among these are:

U.S.C., Title 12:
- § 91 (Transfers by bank and other acts in contemplation of insolvency)
- § 632 (Jurisdiction of United States district courts in cases arising out of foreign banking jurisdiction where Federal reserve bank a party)

U.S.C., Title 19:
- § 199 (Judgments for customs duties, how payable)

U.S.C., Title 26:
- § 1610(a) (Surrender of property subject to distraint)

U.S.C., Title 28, former:
- § 122 (Creation of new district or transfer of territory; lien)
- § 350 (Time for making application for appeal or certiorari; stay pending application for certiorari)
- § 489 (District Attorneys; reports to Department of Justice)
- § 574 (Marshals, fees enumerated)
- § 786 (Judgments for duties; collected in coin)
- § 811 (Interest on judgments)
- § 838 (Executions; run in all districts of State)
- § 839 (Executions; run in every State and Territory)
- § 840 (Executions; stay on conditions), as modified by Rule 62(b).
- § 841 (Executions; stay of one term), as modified by Rule 62(f)
- § 842 (Executions; against officers of revenue in cases of probable cause), as incorporated in *Subdivision (b)* of this rule
- § 843 (Imprisonment for debt)
- § 844 (Imprisonment for debt; discharge according to State laws)
- § 845 (Imprisonment for debt; jail limits)
- § 846 (Fieri Facias; appraisal of goods; appraisers)
- § 847 (Sales; real property under order or decree)
- § 848 (Sales; personal property under order or decree)
- § 849 (Sales; necessity of notice)
- § 850 (Sales; death of marshall after levy or after sale)
- § 869 (Bond in former error and on appeal) as incorporated in Rule 73(c)
- § 874 (Supersedeas), as modified by Rules 62(d) and 73(d)

U.S.C., Title 31:
- § 195 (Purchase on execution)

U.S.C., Title 33:
- § 918 (Collection of defaulted payments)

U.S.C., Title 49:
- § 74(g) (Causes of action arising out of Federal control of railroads; execution and other process)

Special statutes of the United States on exemption from execution are also continued. Among these are:

U.S.C., Title 2:
- § 118 (Actions against officers of Congress for official acts)

U.S.C., Title 5:
- § 729 (Federal employees retirement annuities not subject to assignment, execution, levy, or other legal process)

U.S.C., Title 10:
- § 610 (Exemption of enlisted men from arrest on civil process)

U.S.C., Title 22, former:
- § 21(h) (Foreign service retirement and disability system; establishment; rules and regulations; annuities; nonassignable; exemption from legal process)

U.S.C., Title 33:
§ 916 (Assignment and exemption from claims of creditors) Longshoremen's and Harborworkers' Compensation Act)
U.S.C., Title 38:
§ 54 (Attachment, levy or seizure of moneys due pensioners prohibited)
§ 393 (Army and Navy Medal of Honor Roll; pensions additional to other pensions; liability to attachment, etc.) Compare Title 34, § 365(c) (Medal of Honor Roll; special pension to persons enrolled)
§ 618 (Benefits exempt from seizure under process and taxation; no deductions for indebtedness to United States)
U.S.C., Title 43:
§ 175 (Exemption from execution of homestead land)
U.S.C., Title 48:
§ 1371o (Panama Canal and railroad retirement annuities, exemption from execution and so forth)

SUPPLEMENTARY NOTE OF ADVISORY COMMITTEE REGARDING THIS RULE

Note. With respect to the provisions of the Soldiers' and Sallors' Civil Relief Act of 1940, 50 U.S.C. Appendix, § 501 et seq., see Notes to Rules 62 and 64 herein.

NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

The amendment assures that, in aid of execution on a judgment, all discovery procedures provided in the rules are available and not just discovery via the taking of a deposition. Under the present language, one court has heid that Rule 34 discovery is unavallable to the judgment creditor. *M. Lowenstein & Sons, Inc.* v. *American Underwear Mfg. Co.*, 11 F.R.D. 172 (E.D.Pa. 1951). Notwithstanding the language, and relying heavily on legislative history referring to Rule 33, the Fifth Circuit has held that a judgment creditor may invoke Rule 33 interrogatories. *United States* v. *McWhirter*, 376 F.2d 102 (5th Cir. 1967). But the court's reasoning does not extend to discovery except as provided in Rules 26-33. One commentator suggests that the existing language might properly be stretched to all discovery, 7 Moore's Federal Practice ¶ 69.05[1] (2d ed. 1966), but another believes that a rules amendment is needed. 3 Barron & Holtzoff, Federal Practice and Procedure 1484 (Wright ed. 1958). Both commentators and the court in *McWhirter* are clear that, as a matter of policy, Rule 69 should authorize the use of all discovery devices provided in the rules.

AMENDMENTS

1948—The amendment effective October 1949 substituted the citation of "Title 28, U.S.C.A., § 2006" in subdivision (b) in place of the citation to "Section 989, Revised Statutes, U.S.C.A., Title 28, § 842".

CROSS REFERENCES

Execution against revenue officers, see section 2006 of this title.
Executions and judicial sales, see section 2001 et seq. of this title.
Executions in favor of United States, see section 2413 of this title.
Power to issue writ of execution, see section 1651 of this title.
Seizure of person or property for satisfaction of judgment, see rule 64.
Stay of execution of judgment, see rule 62.
Writ of execution for delivery of possession, see rule 70.

Rule 70. Judgment for Specific Acts; Vesting Title

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

NOTES OF ADVISORY COMMITTEE ON RULES

Compare former Equity Rules 7 (Process, Mesne and Final), 8 (Enforcement of Final Decrees), and 9 (Writ of Assistance). To avoid possible confusion, both old and new denominations for attachment (sequestration) and execution (assistance) are used in this rule. Compare with the provision in this rule that the judgment may itself vest title, 6 Tenn.Ann.Code (Williams, 1934), § 10594; 2 Conn.Gen.Stat. (1930), § 5455; N.M.Stat.Ann. (Courtright, 1929), § 117-117; 2 Ohio Gen.Code Ann. (Page, 1926), § 11590; and England, Supreme Court of Judicature Act (1925), § 47.

CROSS REFERENCES

Contempts, power of court, see section 401 of Title 18, Crimes and Criminal Procedure.
Execution, see rule 69.
Power to issue writs, see section 1651 of this title.
Remedies of attachment and sequestration, see rule 64.

Rule 71. Process in Behalf of and Against Persons Not Parties

When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

NOTES OF ADVISORY COMMITTEE ON RULES

Compare former Equity Rule 11 (Process in Behalf of and Against Persons Not Parties). Compare also *Terrell* v. *Allison*, 21 Wall. 289, 22 L.Ed. 634 (U.C., 1875); *Farmers' Loan and Trust Co.* v. *Chicago and A. Ry. Co.*, 44 Fed. 653 (C.C.Ind., 1890); *Robert Findlay Mfg. Co.* v. *Hygrade Lighting Fixture Corp.*, 288 Fed. 80 (E.D.N.Y., 1923); *Thompson* v. *Smith*, Fed.Cas.No. 13,977 (C.C.Minn., 1870).

CROSS REFERENCES

Execution, see rule 69.
Parties generally, see rules 17 to 25.
Power to issue writs, see section 1651 of this title.
Process generally, see rule 4.
Writs of attachment, sequestration and equivalent remedies, see rule 64.

Rule 71A. Condemnation of Property

(a) Applicability of other rules

The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

(b) Joinder of properties

The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.

(c) Complaint

(1) *Caption.* The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(2) *Contents.* The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners." Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

(3) *Filing.* In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

(d) Process

(1) *Notice; Delivery.* Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

(2) *Same; Form.* Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of his property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's attorney and an address within the district in which action is brought where he may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.

(3) *Service of Notice.*

(i) Personal service. Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4(c) and (d) upon a defendant who resides within the United States or its territories or insular possessions and whose residence is known.

(ii) Service by Publication. Upon the filing of a certificate of the plaintiff's attorney stating that he believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed his place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to "Unknown Owners."

Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.

(4) *Return; amendment.* Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4(g) and (h).

(e) Appearance or answer

If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just

compensation, whether or not he has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

(f) Amendment of pleadings

Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (i) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivision (d) of this rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy of each amendment, and he shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve his answer to the amendment pleading, in the form and manner and with the same effect as there provided.

(g) Substitution of parties

If a defendant dies or becomes incompetent or transfers his interest after his joinder, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be served upon a person not already a party, service shall be made as provided in subdivision (d)(3) of this rule.

(h) Trial

If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

(i) Dismissal of action

(1) *As of Right.* If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) *By Stipulation.* Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) *By Order of the Court.* At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

(4) *Effect.* Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.

(j) Deposit and its distribution

The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to him on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to him, the court shall enter judgment against him and in favor of the plaintiff for the overpayment.

(k) Condemnation under a State's power of eminent domain

The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

(*l*) Costs

Costs are not subject to Rule 54(d).

(Added Apr. 30, 1951, eff. Aug. 1, 1951, and amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

Supplementary report

The Court will remember that at its conference on December 2, 1948, the discussion was confined to subdivision (h) of the rule (* * *), the particular question being whether the tribunal to award compensation

should be a commission or a jury in cases where the Congress has not made specific provision on the subject. The Advisory Committee was agreed from the outset that a rule should not be promulgated which would overturn the decision of the Congress as to the kind of tribunal to fix compensation, provided that the system established by Congress was found to be working well. We found two instances where the Congress had specified the kind of tribunal to fix compensation. One case was the District of Columbia (U.S.C., Title 40, §§ 361-386 (now D.C. code, 1951 Ed., Title 16-619 to 16-644)) where a rather unique system exists under which the court is required in all cases to order the selection of a "jury" of five from among not less than twenty names drawn from "the special box provided by law." They must have the usual qualifications of jurors and in addition must be freeholders of the District and not in the service of the United States or the District. That system has been in effect for many years, and our inquiry revealed that it works well under the conditions prevailing in the District, and is satisfactory to the courts of the District, the legal profession and to property owners.

The other instance is that of the Tennessee Valley Authority, where the act of Congress (U.S.C., Title 16, § 831x) provides that compensation is fixed by three disinterested commissioners appointed by the court, whose award goes before the District Court for confirmation or modification. The Advisory Committee made a thorough inquiry into the practical operation of the TVA commission system. We obtained from counsel for the TVA the results of their experience, which afforded convincing proof that the commission system is preferable under the conditions affecting TVA and that the jury system would not work satisfactorily. We then, under date of February 6, 1947, wrote every Federal judge who had ever sat in a TVA condemnation case, asking his views as to whether the commission system is satisfactory and whether a jury system should be preferred. Of 21 responses from the judges 17 approved the commission system and opposed the substitution of a jury system for the TVA. Many of the judges went further and opposed the use of juries in any condemnation cases. Three of the judges preferred the jury system, and one dealt only with the TVA provision for a three judge district court. The Advisory Committee has not considered abolition of the three judge requirement of the TVA Act, because it seemed to raise a question of jurisdiction, which cannot be altered by rule. Nevertheless the Department of Justice continued its advocacy of the jury system for its asserted expedition and economy; and others favored a uniform procedure. In consequence of these divided counsels the Advisory Committee was itself divided, but in its May 1948 Report to the Court recommended the following rule as approved by a majority (* * *):

(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix. Trial of all issues shall otherwise be by the court.

The effect of this was to preserve the existing systems in the District of Columbia and in TVA cases, but to provide for a jury to fix compensation in all other cases.

Before the Court's conference of December 2, 1948, the Chief Justice informed the Committee that the Court was particularly interested in the views expressed by Judge John Paul, judge of the United States District Court for the Western District of Virginia, in a letter from him to the chairman of the Advisory Committee, dated February 13, 1947. Copies of all the letters from judges who had sat in TVA cases had been made available to the Court, and this letter from Judge Paul is one of them. Judge Paul strongly opposed jury trials and recommended the commission system in large projects like the TVA, and his views seemed to have impressed the Court and to have been the occasion for the conference.

The reasons which convinced the Advisory Committee that the use of commissioners instead of juries is desirable in TVA cases were these:

1. The TVA condemns large areas of land of similar kind, involving many owners. Uniformity in awards is essential. The commission system tends to prevent discrimination and provide for uniformity in compensation. The jury system tends to lack of uniformity. Once a reasonable and uniform standard of values for the area has been settled by a commission, litigation ends and settlements result.

2. Where large areas are involved many small landowners reside at great distances from the place where a court sits. It is a great hardship on humble people to have to travel long distances to attend a jury trial. A commission may travel around and receive the evidence of the owner near his home.

3. It is impracticable to take juries long distances to view the premises.

4. If the cases are tried by juries the burden on the time of the courts is excessive.

These considerations are the very ones Judge Paul stressed in his letter. He pointed out that they applied not only to the TVA but to other large governmental projects, such as flood control, hydroelectric power, reclamation, national forests, and others. So when the representatives of the Advisory Committee appeared at the Court's conference December 2, 1948, they found it difficult to justify the proposed provision in subdivision (h) of the rule that a jury should be used to fix compensation in all cases where Congress had not specified the tribunal. If our reasons for preserving the TVA system were sound, provision for a jury in similar projects of like magnitude seemed unsound.

Aware of the apparent inconsistency between the acceptance of the TVA system and the provision for a jury in all other cases, the members of the Committee attending the conference of December 2, 1948, then suggested that in the other cases the choice of jury or commission be left to the discretion of the District Court, going back to a suggestion previously made by Committee members and reported at page 15 of the Preliminary Draft of June 1947. They called the attention of the Court to the fact that the entire Advisory Committee had not been consulted about this suggestion and proposed that the draft be returned to the Committee for further consideration, and that was done.

The proposal we now make for subdivision (h) is as follows:

(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

In the 1948 draft the Committee had been almost evenly divided as between jury or commission and that

made it easy for us to agree on the present draft. It would be difficult to state in a rule the various conditions to control the District Court in its choice and we have merely stated generally the matters which should be considered by the District Court.

The rule as now drafted seems to meet Judge Paul's objection. In large projects like the TVA the court may decide to use a commission. In a great number of cases involving only sites for buildings or other small areas, where use of a jury is appropriate, a jury may be chosen. The District Court's discretion may also be influenced by local preference or habit, and the preference of the Department of Justice and the reasons for its preference will doubtless be given weight. The Committee is convinced that there are some types of cases in which use of a commission is preferable and others in which a jury may be appropriately used, and that it would be a mistake to provide that the same kind of tribunal should be used in all cases. We think the available evidence clearly leads to that conclusion.

When this suggestion was made at the conference of December 2, 1948, representatives of the Department of Justice opposed it, expressing opposition to the use of a commission in any case. Their principal ground for opposition to commissions was then based on the assertion that the commission system is too expensive because courts allow commissioners too large compensation. The obvious answer to that is that the compensation of commissioners ought to be fixed or limited by law, as was done in the TVA Act, and the agency dealing with appropriations—either the Administrative Office or some other interested department of the government—should correct that evil, if evil there be, by obtaining such legislation. Authority to promulgate rules of procedure does not include power to fix compensation of government employees. The Advisory Committee is not convinced that even without such legislation the commission system is more expensive than the jury system. The expense of jury trials includes not only the per diem and mileage of the jurors impaneled for a case but like items for the entire venire. In computing cost of jury trials, the salaries of court officials, judges, clerks, marshals and deputies must be considered. No figures have been given to the Committee to establish that the cost of the commission system is the greater.

We earnestly recommend the rule as now drafted for promulgation by the Court, in the public interest.

The Advisory Committee have given more time to this rule, including time required for conferences with the Department of Justice to hear statements of its representatives, than has been required by any other rule. The rule may not be perfect but if faults develop in practice they may be promptly cured. Certainly the present conformity system is atrocious.

Under state practices, just compensation is normally determined by one of three methods: by commissioners; by commissioners with a right of appeal to and trial de novo before a jury; and by a jury, without a commission. A trial to the court or to the court including a master are, however, other methods that are occasionally used. Approximately 5 states use only commissioners; 23 states use commissioners with a trial de novo before a jury; and 18 states use only the jury. This classification is advisedly stated in approximate terms, since the same state may utilize diverse methods, depending upon different types of condemnations or upon the locality of the property, and since the methods used in a few states do not permit of a categorical classification. To reject the proposed rule and leave the situation as it is would not satisfy the views of the Department of Justice. The Department and the Advisory Committee agree that the use of a commission, with appeal to a jury, is a wasteful system.

The Department of Justice has a voluminous "Manual on Federal Eminent Domain," the 1940 edition of which has 948 pages with an appendix of 73 more pages. The title page informs us the preparation of the manual was begun during the incumbency of Attorney General Cummings, was continued under Attorney General Murphy, and completed during the incumbency of Attorney General Jackson. The preface contains the following statement:

It should also be mentioned that the research incorporated in the manual would be of invaluable assistance in the drafting of a new uniform code, or rules of court, for federal condemnation proceedings, which are now greatly confused, not only by the existence of over seventy federal statutes governing condemnations for different purposes—statutes which sometimes conflict with one another—but also by the countless problems occasioned by the requirements of conformity to state law. Progress of the work has already demonstrated that the need for such reform exists.

It is not surprising that more than once Attorneys General have asked the Advisory Committee to prepare a federal rule and rescue the government from this morass.

The Department of Justice has twice tried and failed to persuade the Congress to provide that juries shall be used in all condemnation cases. The debates in Congress show that part of the opposition to the Department of Justice's bills came from representatives opposed to jury trials in all cases, and in part from a preference for the conformity system. Our present proposal opens the door for district judges to yield to local preferences on the subject. It does much for the Department's points of view. It is a great improvement over the present so-called conformity system. It does away with the wasteful "double" system prevailing in 23 states where awards by commissions are followed by jury trials.

Aside from the question as to the choice of a tribunal to award compensation, the proposed rule would afford a simple and improved procedure.

We turn now to an itemized explanation of the other changes we have made in the 1948 draft. Some of these result from recent amendments to the Judicial Code. Others result from a reconsideration by the Advisory Committee of provisions which we thought could be improved.

1. In the amended Judicial Code, the district courts are designated as "United States District Courts" instead of "District Courts of the United States," and a corresponding change has been made in the rule.

2. After the 1948 draft was referred back to the committee, the provision in subdivision (c)(2), relating to naming defendants, * * * which provided that the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a search of the records to the extent commonly made by competent searchers of title in the vicinity "in light of the type and value of the property involved," the phrase in quotation marks was changed to read "in the light of the character and value of the property involved and the interests to be acquired."

The Department of Justice made a counter proposal * * * that there be substituted the words "reasonably diligent search of the records, considering the type." When the American Bar Association thereafter considered the draft, it approved the Advisory Committee's draft of this subdivision, but said that it had no objection to the Department's suggestion. Thereafter, in an effort to eliminate controversy, the Advisory Committee accepted the Department's suggestion as to (c)(2), using the word "character" instead of the word "type."

The Department of Justice also suggested that in subdivision (d)(3)(2) relating to service by publication, the search for a defendant's residence as a preliminary to publication be limited to the state in which the complaint is filed. Here again the American Bar Association's report expressed the view that the Department's suggestion was unobjectionable and the Advisory Committee thereupon adopted it.

3. Subdivision (k) of the 1948 draft is as follows:

(k) Condemnation Under a State's Power of Eminent Domain. If the action involves the exercise of the power of eminent domain under the law of a state, the practice herein prescribed may be altered to the extent necessary to observe and enforce any condition affecting the substantial rights of a litigant attached

by the state law to the exercise of the state's power of eminent domain.

Occasionally condemnation cases under a state's power of eminent domain reach a United States District Court because of diversity of citizenship. Such cases are rare, but provision should be made for them.

The 1948 draft of (k) required a district court to decide whether a provision of state law specifying the tribunal to award compensation is or is not a "condition" attached to the exercise of the state's power. On reconsideration we concluded that it would be wise to redraft (k) so as to avoid that troublesome question. As to conditions in state laws which affect the substantial rights of a litigant, the district courts would be bound to give them effect without any rule on the subject. Accordingly we present two alternative revisions. One suggestion supported by a majority of the Advisory Committee is as follows:

(k) Condemnation Under a State's Power of Eminent Domain. The practice herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

The other is as follows:

(k) Condemnation Under a State's Power of Eminent Domain. The practice herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law gives a right to a trial by jury such a trial shall in any case be allowed to the party demanding it within the time permitted by these rules, and in that event no hearing before a commission shall be had.

The first proposal accepts the state law as to the tribunals to fix compensation, and in that respect leaves the parties in precisely the same situation as if the case were pending in a state court, including the use of a commission with appeal to a jury, if the state law so provides. It has the effect of avoiding any question as to whether the decisions in *Erie R. Co.* v. *Tompkins* and later cases have application to a situation of this kind.

The second proposal gives the parties a right to a jury trial if that is provided for by state law, but prevents the use of both commission and jury. Those members of the Committee who favor the second proposal do so because of the obvious objections to the double trial, with a commission and appeal to a jury. As the decisions in *Erie R. Co.* v. *Tompkins* and later cases may have a bearing on this point, and the Committee is divided, we think both proposals should be placed before the Court.

4. The provision * * * of the 1948 draft * * * prescribing the effective date of the rule was drafted before the recent amendment of the Judicial Code on that subject. On May 10, 1950, the President approved an act which amended section 2072 of Title 28, United States Code, to read as follows:

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of 90 days after they have been thus reported.

To conform to the statute now in force, we suggest a provision as follows:

Effective Date. This Rule 71A and the amendment to Rule 81(a) will take effect on August 1, 1951. Rule 71A governs all proceedings in actions brought after it takes effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court its application in a particular action pending when the rule takes effect would not be feasible or would work injustice, in which event the former procedure applies.

If the rule is not reported to Congress by May 1, 1951, this provision must be altered.

5. We call attention to the fact that the proposed rule does not contain a provision for the procedure to be followed in order to exercise the right of the United States to take immediate possession or title, when the condemnation proceeding is begun. There are several statutes conferring such a right which are cited in the original notes to the May 1948 draft * * *. The existence of this right is taken into account in the rule. In paragraph (c)(2), * * * it is stated: "Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known." That is to enable the United States to exercise the right to immediate title or possession without the delay involved in ascertaming the names of all interested parties. The right is also taken into account in the provision relating to dismissal (paragraph (i) subdivisions (1), (2), and (3), * * *); also in paragraph (j) relating to deposits and their distribution.

The Advisory Committee considered whether the procedure for exercising the right should be specified in the rule and decided against it, as the procedure now being followed seems to be giving no trouble, and to draft a rule to fit all the statutes on the subject might create confusion.

The American Bar Association has taken an active interest in a rule for condemnation cases. In 1944 its House of Delegates adopted a resolution which among other things resolved:

That before adoption by the Supreme Court of the United States of any redraft of the proposed rule, time and opportunity should be afforded to the bar to consider and make recommendations concerning any such redraft.

Accordingly, in 1950 the revised draft was submitted to the American Bar Association and its section of real property, probate and trust law appointed a committee to consider it. That committee was supplied with copies of the written statement from the Department of Justice giving the reasons relied on by the Department for preferring a rule to use juries in all cases. The Advisory Committee's report was approved at a meeting of the section of real property law, and by the House of Delegates at the annual meeting of September 1950. The American Bar Association report gave particular attention to the question whether juries or commissions should be used to fix compensation, approved the Advisory Committee's solution appearing in their latest draft designed to allow use of commissions in projects comparable to the TVA, and rejected the proposal for use of juries in all cases.

In November 1950 a committee of the Federal Bar Association, the chairman of which was a Special Assistant to the Attorney General, made a report which reflected the attitude of the Department of Justice on the condemnation rule.

Aside from subdivision (h) about the tribunal to award compensation the final draft of the condemnation rule here presented has the approval of the American Bar Association and, we understand, the Department of Justice, and we do not know of any opposition to it. Subdivision (h) has the unanimous approval of the Advisory Committee and has been approved by the American Bar Association. The use of commissions in TVA cases, and, by fair inference, in cases comparable to the TVA, is supported by 17 out of 20 judges who up to 1947 had sat in TVA cases. The legal staff of the TVA has virogously objected to the substitution of juries for commissions in TVA cases. We regret to report that the Department of Justice still asks that subdivision (h) be altered to provide for jury trials in all cases where Congress has not specified the tribunal. We understand that the Department approves the proposal that the system prevailing in 23 states for the "double" trial, by commission with appeal to and trial de novo before a jury, should be abolished, and also asks that on demand a jury should be substituted for a commission, in those states where use of a commission alone is now required. The Advisory Committee has no evidence that commissions do not operate satisfactorily in the case of projects comparable to the TVA.

Original report

General Statement. 1. Background. When the Advisory Committee was formulating its recommendations to the Court concerning rules of procedure, which subsequently became the Federal Rules of 1938, the Committee concluded at an early stage not to fix the procedure in condemnation cases. This is a matter principally involving the exercise of the federal power of eminent domain, as very few condemnation cases involving the state's power reach the United States District Courts. The Committee's reasons at that time were that inasmuch as condemnation proceedings by the United States are governed by statutes of the United States, prescribing different procedure for various agencies and departments of the government, or, in the absence of such statutes, by local state practice under the Conformity Act (40 U.S.C. sec. 258), it would be extremely difficult to draft a uniform rule satisfactory to the various agencies and departments of the government and to private parties; and that there was no general demand for a uniform rule. The Committee continued in that belief until shortly before the preparation of the April 1937 Draft of the Rules, when the officials of the Department of Justice having to do with condemnation cases urgently requested the Committee to propose rules on this subject. The Committee undertook the task and drafted a Condemnation Rule which appeared for the first time as Rule 74 of the April 1937 Draft. After the publication and distribution of this initial draft many objections were urged against it by counsel for various governmental agencies, whose procedure in condemnation cases was prescribed by federal statutes. Some of these agencies wanted to be excepted in whole or in part from the operation of the uniform rule proposed in April 1937. And the Department of Justice changed its position and stated that it preferred to have government condemnations conducted by local attorneys familiar with the state practice, which was applied under the Conformity Act where the Acts of Congress do not prescribe the practice; that it preferred to work under the Conformity Act without a uniform rule of procedure. The profession generally showed little interest in the proposed uniform rule. For these reasons the Advisory Committee in its Final Report to the Court in November 1937 proposed that all of Rule 74 be stricken and that the Federal Rules be made applicable only to appeals in condemnation cases. See note to Rule 74 of the Final Report.

Some six or seven years later when the Advisory Committee was considering the subject of amendments to the Federal Rules both government officials and the profession generally urged the adoption of some uniform procedure. This demand grew out of the volume of condemnation proceedings instituted during the war, and the general feeling of dissatisfaction with the diverse condemnation procedures that were applicable in the federal courts. A strongly held belief was that both the sovereign's power to condemn and the property owner's right to compensation could be promoted by a simplified rule. As a consequence the Committee proposed a Rule 71A on the subject of condemnation in its Preliminary Draft of May 1944. In the Second Preliminary Draft of May 1945 this earlier proposed Rule 71A was, however, omitted. The Committee did not then feel that it had sufficient time to prepare a revised draft satisfactorily to it which would meet legitimate objections made to the draft of May 1944. To avoid unduly delaying the proposed amendments to existing rules the Committee concluded to proceed in the regular way with the preparation of the amendments to these rules and deal with the question of a condemnation rule as an independent matter. As a consequence it made no recommendations to the Court on condemnation in its Final Report of Proposed Amendments of June 1946; and the amendments which the Court adopted in December 1946 did not deal with condemnation. After concluding its task relative to amendments, the Committee returned to a consideration of eminent domain, its proposed Rule 71A of May 1944, the suggestions and criticisms that had been presented in the interim, and in June 1947 prepared and distributed to the profession another draft of a proposed condemnation rule. This draft contained several alternative provisions; specifically called attention to and asked for opinion relative to these matters, and in particular as to the constitution of the tribunal to award compensation. The present draft was based on the June 1947 formulation, in light of the advice of the profession on both matters of substance and form.

2. Statutory Provisions. The need for a uniform condemnation rule in the federal courts arises from the fact that by various statutes Congress has prescribed diverse procedures for certain condemnation proceedings, and, in the absence of such statutes, has prescribed conformity to local state practice under 40 U.S.C. § 258. This general conformity adds to the diversity of procedure since in the United States there are multifarious methods of procedure in existence. Thus in 1931 it was said that there were 269 different methods of judicial procedure in different classes of condemnation cases and 56 methods of nonjudicial or administrative procedure. First Report of Judicial Council of Michigan, 1931, § 46, pp. 55–56. These numbers have not decreased. Consequently, the general requirement of conformity to state practice and procedure, particularly where the condemnor is the United States, leads to expense, delay and uncertainty. In advocacy of a uniform federal rule, see Armstrong, Proposed Amendments to Federal Rules for Civil Procedure 1944, 4 F.R.D. 124, 134; id., Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments, 1946, 5 F.R.D. 339, 357.

There are a great variety of Acts of Congress authorizing the exercise of the power of eminent domain by the United States and its officers and agencies. These statutes for the most part do not specify the exact procedure to be followed, but where procedure is prescribed, it is by no means uniform.

The following are instances of Acts which merely authorize the exercise of the power without specific declaration as to the procedure:

U.S.C., Title 16:

§ 404c-11 (Mammoth Cave National Park; acquisition of lands, interests in lands or other property for park by the Secretary of the Interior).

§ 426d (Stones River National Park; acquisition of land for parks by the Secretary of the Army).

§ 450aa (George Washington Carver National Monument; acquisition of land by the Secretary of the Interior).

§ 517 (National forest reservation; title to lands to be acquired by the Secretary of Agriculture).

U.S.C., Title 42:

§§ 1805(b)(5), 1813(b) (Atomic Energy Act).

The following are instances of Acts which authorized condemnation and declare that the procedure is to conform with that of similar actions in state courts:

U.S.C., Title 16:

§ 423k (Richmond National Battlefield Park; acquisition of lands by the Secretary of the Interior).

§ 714 (Exercise by water power licensee of power of eminent domain).

U.S.C., Title 24:

§ 78 (Condemnation of land for the former National Home for Disabled Volunteer Soldiers).

U.S.C., Title 33:

§ 591 (Condemnation of lands and materials for river and harbor improvement by the Secretary of the Army).

U.S.C., Title 40:

§ 257 (Condemnation of realty for sites for public building and for other public uses by the Secretary of the Treasury authorized).

§ 258 (Same procedure).

U.S.C., Title 50:

§ 171 (Acquisition of land by the Secretary of the Army for national defense).

§ 172 (Acquisition of property by the Secretary of the Army, etc., for production of lumber).

§ 632 App. (Second War Powers Act, 1942; acquisition of real property for war purposes by the Secretary of the Army, the Secretary of the Navy and others).

The following are Acts in which a more or less complete code of procedure is set forth in connection with the taking:

U.S.C., Title 16:

§ 831x (Condemnation by Tennessee Valley Authority).

U.S.C., Title 40:

§§ 361-386 (now D.C. Code, 1951 Ed., Title 16-619 to 16-644) (Acquisition of lands in District of Columbia for use of United States; condemnation).

3. Adjustment of Rule to Statutory Provisions. While it was apparent that the principle of uniformity should be the basis for a rule to replace the multiple diverse procedures set out above, there remained a serious question as to whether an exception could properly be made relative to the method of determining compensation. Where Congress had provided for conformity to state law the following were the general methods in use: an initial determination by commissioners, with appeal to a judge; an initial award, likewise made by commissioners, but with the appeal to a jury; and determination by a jury without a previous award by commissioners. In two situations Congress had specified the tribunal to determine the issue of compensation: condemnation by the Tennessee Valley Authority; and condemnation in the District of Columbia. Under the TVA procedure the initial determination of value is by three disinterested commissioners, appointed by the court, from a locality other than the one in which the land lies. Either party may except to the award of the commission; in that case the exceptions are to be heard by three district judges (unless the parties stipulate for a lesser number), with a right of appeal to the circuit court of appeals. The TVA is a regional agency. It is faced with the necessity of acquiring a very substantial acreage within a relatively small area, and charged with the task of carrying on within the Tennessee Valley and in cooperation with the local people a permanent program involving navigation and flood control, electric power, soil conservation, and general regional development. The success of this program is partially dependent upon the good will and cooperation of the people of the Tennessee Valley, and this in turn partially depends upon the land acquisition program. Disproportionate awards among landowners would create dissatisfaction and ill will. To secure uniformity in treatment Congress provided the rather unique procedure of the three-judge court to review de novo the initial award of the commissioners. This procedure has worked to the satisfaction of the property owners and the TVA. A full statement of the TVA position and experience is set forth in Preliminary Draft of Proposed Rule to Govern Condemnation Cases (June, 1947) 15-19. A large majority of the district judges with experience under this procedure approve it, subject to some objection to the requirement for a three-judge district court to review commissioners' awards. A statutory three-judge requirement is, however, jurisdictional and must be strictly followed. *Stratton* v. *St. Louis, Southwestern Ry. Co.*, 1930, 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135; *Ayrshire Collieries Corp.* v. *United States*, 1947, 67 S.Ct. 1168, 331 U.S. 132, 91 L.Ed. 1391. Hence except insofar as the TVA statute itself authorizes the parties to stipulate for a court of less than three judges, the requirement must be followed, and would seem to be beyond alteration by court rule even if change were thought desirable. Accordingly the TVA procedure is retained for the determination of compensation in TVA condemnation cases. It was also thought desirable to retain the specific method Congress had prescribed for the District of Columbia, which is a so-called jury of five appointed by the court. This is a local matter and the specific treatment accorded by Congress has given local satisfaction.

Aside from the foregoing limited exceptions dealing with the TVA and the District of Columbia, the question was whether a uniform method for determining compensation should be a commission with appeal to a district judge, or a commission with appeal to a jury, or a jury without a commission. Experience with the commission on a nationwide basis, and in particular with the utilization of a commission followed by an appeal to a jury, has been that the commission is time consuming and expensive. Furthermore, it is largely a futile procedure where it is preparatory to jury trial. Since in the bulk of states a land owner is entitled eventually to a jury trial, since the jury is a traditional tribunal for the determination of questions of value, and since experience with juries has proved satisfactory to both government and land owner, the right to jury trial is adopted as the general rule. Condemnation involving the TVA and the District of Columbia are the two exceptions. See Note to Subdivision (h), infra.

Note to Subdivision (a). As originally promulgated the Federal Rules governed appeals in condemnation proceedings but were not otherwise applicable. Rule 81(a)(7). Pre-appeal procedure, in the main, conformed to state procedure. See statutes and discussion, supra. The purpose of Rule 71A is to provide a uniform procedure for condemnation in the federal district courts, including the District of Columbia. To achieve this purpose Rule 71A prescribes such specialized procedure as is required by condemnation proceedings, otherwise it utilizes the general framework of the Federal Rules where specific detail is unnecessary. The adoption of Rule 71A, of course, renders paragraph (7) of Rule 81(a) unnecessary.

The promulgation of a rule for condemnation procedure is within the rule-making power. The Enabling Act [Act of June 19, 1934, c. 651, §§ 1, 2 (48 Stat. 1064), 28 U.S.C. former §§ 723b, 723c, now § 2072] gives the Supreme Court "the power to prescribe, by general rules * * * the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law." Such rules, however, must not abridge, enlarge, or modify substantive rights. In *Kohl* v. *United States*, 1875, 91 U.S. 367, 23 L.Ed. 449, a proceeding instituted by the United States to appropriate land for a post-office site under a statute enacted for such purpose, the Supreme Court held that "a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is * * * a suit at common law, when initiated in a court." See also *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 1905, 25 S.Ct. 251, 196 U.S. 239, 23 L.Ed. 449, infra, under subdivision (k). And the Conformity Act, 40 U.S.C. § 258, which is superseded by Rule 71A, deals only with "practice, pleadings, forms and proceedings and not with matters of substantive laws." *United States* v. *243.22 Acres of Land in Village of Farmingdale, Town of Babylon, Suffolk County, N.Y.*, D.C.N.Y. 1942, 43 F.Supp. 561, affirmed 129 F.2d 678, certiorari denied, 63 S.Ct. 441, 317 U.S. 698, 87 L.Ed. 558.

Rule 71A affords a uniform procedure for all cases of condemnation invoking the national power of eminent domain, and, to the extent stated in subdivision (k), for cases invoking a state's power of eminent domain; and supplants all statutes prescribing a different procedure. While the almost exclusive utility of the rule is for the condemnation of real property, it also applies to the condemnation of personal property, either as an incident to real property or as the sole object of the proceeding, when permitted or required by statute. See 38 U.S.C. § 438j (World War Veterans' Relief Act); 42 U.S.C. §§ 1805, 1811, 1813 (Atomic Energy Act); 50 U.S.C. § 79 (Nitrates Act); 50 U.S.C. §§ 161-166 (Helium Gas Act). Requisitioning of personal property with the right in the owner to sue the United States, where the compensation cannot be agreed upon (see 42 U.S.C. § 1813, supra, for example) will continue to be the normal method of acquiring personal property and Rule 71A in no way interferes with or restricts any such right. Only where the law requires or permits the formal procedure of condemnation to be utilized will the rule have any applicability to the acquisition of personal property.

Rule 71A is not intended to and does not supersede the Act of February 26, 1931, ch. 307, §§ 1-5 (46 Stat. 1421), 40 U.S.C. §§ 258a-258e, which is a supplementary condemnation statute, permissive in its nature and designed to permit the prompt acquisition of title by the United States, pending the condemnation proceeding, upon a deposit in court. See *United States* v. *76,800 Acres, More or Less, of Land, in Bryan and Liberty Counties, Ga.*, D.C.Ga. 1942, 44 F.Supp. 653; *United States* v. *17,280 Acres of Land, More or Less, Situated in Saunders County, Nebr.*, D.C.Neb. 1942, 47 F.Supp. 267. The same is true insofar as the following or any other statutes authorize the acquisition of title or the taking of immediate possession:

U.S.C., Title 33:

§ 594 (When immediate possession of land may be taken; for a work of river and harbor improvements).

U.S.C., Title 42:

§ 1813(b) (When immediate possession may be taken under Atomic Energy Act).

U.S.C., Title 50:

§ 171 (Acquisition of land by the Secretary of the Army for national defense).

§ 632 App. (Second War Powers Act, 1942; acquisition of real property for war purposes by the Secretary of the Army, the Secretary of the Navy, and others).

Note to Subdivision (b). This subdivision provides for broad joinder in accordance with the tenor of other rules such as Rule 18. To require separate condemnation proceedings for each piece of property separately owned would be unduly burdensome and would serve no useful purpose. And a restriction that only properties may be joined which are to be acquired for the same public use would also cause difficulty. For example, a unified project to widen a street, construct a bridge across a navigable river, and for the construction of approaches to the level of the bridge on both sides of the river might involve acquiring property for different public uses. Yet it is eminently desirable that the plaintiff may in one proceeding condemn all the property interests and rights necessary to carry out this project. Rule 21 which allows the court to sever and proceed separately with any claim against a party, and Rule 42(b) giving the court broad discretion to order separate trials give adequate protection to all defendants in condemnation proceedings.

Note to Subdivision (c). Since a condemnation proceeding is in rem and since a great many property owners are often involved, paragraph (1) requires the property to be named and only one of the owners. In other respects the caption will contain the name of the court, the title of the action, file number, and a designation of the pleading as a complaint in accordance with Rule 10(a).

Since the general standards of pleading are stated in other rules, paragraph (2) prescribes only the necessary detail for condemnation proceedings. Certain statutes allow the United States to acquire title or possession immediately upon commencement of an action. See the Act of February 26, 1931, ch. 307 §§ 1-5 (46 Stat. 1421), 40 U.S.C. §§ 258a-258e, supra; and 33 U.S.C. § 594, 42 U.S.C. § 1813(b), 50 U.S.C. §§ 171, 632, supra. To carry out the purpose of such statutes and to aid the condemnor in instituting the action even where title is not acquired at the outset, the plaintiff is initially required to join as defendants only the persons having or claiming an interest in the property whose names are then known. This in no way prejudices the property owner, who must eventually be joined as a defendant, served with process, and allowed to answer before there can be any hearing involving the compensation to be paid for his piece of property. The rule requires the plaintiff to name all persons having or claiming an interest in the property of whom the plaintiff has learned and, more importantly, those appearing of record. By charging the plaintiff with the necessity to make "a search of the records of the extent commonly made by competent searchers of title in the vicinity in light of the type and value of the property involved" both the plaintiff and property owner are protected. Where a short term interest in property of little value is involved, as a two or three year easement over a vacant land for purposes of ingress and egress to other property, a search of the records covering a long period of time is not required. Where on the other hand fee simple title in valuable property is being condemned the search must necessarily cover a much longer period of time and be commensurate with the interests involved. But even here the search is related to the type made by competent title searchers in the vicinity. A search that extends back to the original patent may be feasible in some midwestern and western states and be proper under certain circumstances. In the Atlantic seaboard states such a search is normally not feasible nor desirable. There is a common sense business accommodation of what title searchers can and should do. For state statutes requiring persons appearing as owners or otherwise interested in the property to be named as defendants, see 3 Colo. Stat. Ann., 1935, c. 61, § 2; Ill. Ann. Stat. (Smith-Hurd) c. 47, § 2; 1 Iowa Code, 1946, § 472.3; Kans. Stat. Ann., 1935, § 26-101; 2 Mass. Laws Ann., 1932, ch. 80A, § 4; 7 Mich. Stat. Ann., 1936, § 8.2; 2 Minn. Stat., Mason, 1927, § 6541; 20 N.J. Stat. Ann., 1939, § 1-2; 3 Wash. Revised Stat., Remington, 1932, Title 6, § 891. For state provisions allowing persons whose names are not known to be designated under the descriptive term of "unknown owner", see Hawaii Revised Laws, 1945, c. 8, § 310 ("such [unknown] defendant may be joined in the petition under a fictitious name."; Ill. Ann. Stat., Smith-Hurd), c. 47, § 2 ("Persons interested, whose names are unknown, may be made parties defendant by the description of the unknown owners; . . ."); Maryland Code Ann., 1939, Ar. 33A, § 1 ("In case any owner or owners is or are not known, he or they may be described in such petition as the unknown owner or owners, or the unknown heir or heirs of a deceased owner."); 2 Mass. Laws Ann., 1932, c. 80A, § 4 ("Persons not in being, unascertained or unknown who may have an interest in any of such land shall be made parties respondent by such description as seems appropriate, * * *"); New Mex. Stat. Ann., 1941, § 25-901 ("the owners * * * shall be parties defendant, by name, if the names are known, and by description of the unknown owners of the land therein described, if their names are unknown."); Utah Code Ann., 1943, § 104-61-7 ("The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants").

The last sentence of paragraph (2) enables the court to expedite the distribution of a deposit, in whole or in part, as soon as pertinent facts of ownership, value and the like are established. See also subdivision (j).

The signing of the complaint is governed by Rule 11.

Note to Subdivision (d). In lieu of a summons, which is the initial process in other civil actions under Rule 4 (a), subdivision (d) provides for a notice which is to contain sufficient information so that the defendant in effect obtains the plaintiff's statement of his claim against the defendant to whom the notice is directed. Since the plaintiff's attorney is an officer of the court and to prevent unduly burdening the clerk of the court, paragraph (1) of subdivision (d) provides that plaintiff's attorney shall prepare and deliver a notice or notices to the clerk. Flexibility is provided by the provision for joint or several notices, and for additional notices. Where there are only a few defendants it may be convenient to prepare but one notice directed to all the defendants. In other cases where there are many defendants it will be more convenient to prepare two or more notices; but in any event a notice must be directed to each named defendant. Paragraph (2) provides that the notice is to be signed by the plaintiff's attorney. Since the notice is to be delivered to the clerk, the issuance of the notice will appear of record in the court. The clerk should forthwith deliver the notice or notices for service to the marshal or to a person specially appointed to serve the notice. Rule 4 (a). The form of the notice is such that, in addition to informing the defendant of the plaintiff's statement of claim, it tells the defendant precisely what his

rights are. Failure on the part of the defendant to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to fix compensation therefor, but it does not preclude the defendant from presenting evidence as to the amount of compensation due him or in sharing the award of distribution. See subdivision (e); Form 28.

While under Rule 4(f) the territorial limits of a summons are normally the territorial limits of the state in which the district court is held, the territorial limits for personal service of a notice under Rule 71A (d)(3) are those of the nation. This extension of process is here proper since the aim of the condemnation proceeding is not to enforce any personal liability and the property owner is helped, not imposed upon, by the best type of service possible. If personal service cannot be made either because the defendant's whereabouts cannot be ascertained, or, if ascertained, the defendant cannot be personally served, as where he resides in a foreign country such as Canada or Mexico, then service by publication is proper. The provisions for this type of service are set forth in the rule and are in no way governed by 28 U.S.C. § 118.

Note to Subdivision (e). Departing from the scheme of Rule 12, subdivision (e) requires all defenses and objections to be presented in an answer and does not authorize a preliminary motion. There is little need for the latter in condemnation proceedings. The general standard of pleading is governed by other rules, particularly Rule 8, and this subdivision (e) merely prescribes what matters the answer should set forth. Merely by appearing in the action a defendant can receive notice of all proceedings affecting him. And without the necessity of answering a defendant may present evidence as to the amount of compensation due him, and he may share in the distribution of the award. See also subdivision (d)(2); Form 28.

Note to Subdivision (f). Due to the number of persons who may be interested in the property to be condemned, there is a likelihood that the plaintiff will need to amend his complaint, perhaps many times, to add new parties or state new issues. This subdivision recognizes that fact and does not burden the court with applications by the plaintiff for leave to amend. At the same time all defendants are adequately protected; and their need to amend the answer is adequately protected by Rule 15, which is applicable by virtue of subdivision (a) of this Rule 71A.

Note to Subdivision (g). A condemnation action is a proceeding in rem. Commencement of the action as against a defendant by virtue of his joinder pursuant to subdivision (c)(2) is the point of cut-off and there is no mandatory requirement for substitution because of a subsequent change of interest, although the court is given ample power to require substitution. Rule 25 is inconsistent with subdivision (g) and hence inapplicable. Accordingly, the time periods of Rule 25 do not govern to require dismissal nor to prevent substitution.

Note to Subdivision (h). This subdivision prescribes the method for determining the issue of just compensation in cases involving the federal power of eminent domain. The method of jury trial provided by subdivision (h) will normally apply in cases involving the state power by virtue of subdivision (k).

Congress has specially constituted a tribunal for the trial of the issue of just compensation in two instances: condemnation under the Tennessee Valley Authority Act; and condemnation in the District of Columbia. These tribunals are retained for reasons set forth in the General Statement: 3. Adjustment of Rule to Statutory Provisions, supra. Subdivision (h) also has prospective application so that if Congress should create another special tribunal, that tribunal will determine the issue of just compensation. Subject to these exceptions the general method of trial of that issue is to be by jury if any party demands it, otherwise that issue, as well as all other issues, are to be tried by the court.

As to the TVA procedure that is continued, U.S.C., Title 16, § 831x requires that three commissioners be appointed to fix the compensation; that exceptions to their award are to be heard by three district judges (unless the parties stipulate for a lesser number) and that the district judges try the question de novo; that an appeal to the circuit court of appeals may be taken within 30 days from the filing of the decision of the district judges; and that the circuit court of appeals shall on the record fix compensation "without regard to the awards of findings theretofore made by the commissioners or the district judges." The mode of fixing compensation in the District of Columbia, which is also continued, is prescribed in U.S.C., Title 40, §§ 361-386. Under § 371 the court is required in all cases to order the selection of a jury of five from among not less than 20 names, drawn "from the special box provided by law." They must have the usual qualifications of jurors and in addition must be freeholders of the District, and not in the service of the United States or the District. A special oath is administered to the chosen jurors. The trial proceeds in the ordinary way, except that the jury is allowed to separate after they have begun to consider their verdict.

There is no constitutional right to jury trial in a condemnation proceeding. *Bauman* v. *Ross,* 1897, 17 S.Ct. 966, 167 U.S. 548, 42 L.Ed. 270. See, also, Hines, Does the Seventh Amendment to the Constitution of the United States Require Jury Trials in all Condemnation Proceedings? 1925, 11 Va.L.Rev. 505; Blair, Federal Condemnation Proceedings and the Seventh Amendment 1927, 41 Harv.L.Rev. 29; 3 Moore's Federal Practice 1938, 3007. Prior to Rule 71A, jury trial in federal condemnation proceedings was, however, enjoyed under the general conformity statute, 40 U.S.C. § 258, in states which provided for jury trial. See generally, 2 Lewis, Eminent Domain 3d ed. 1909, §§ 509, 510; 3 Moore, op. cit. supra. Since the general conformity statute is superseded by Rule 71A, see supra under subdivision (a), and since it was believed that the rule to be substituted should likewise give a right to jury trial, subdivision (h) establishes that method as the general one for determining the issue of just compensation.

Note to Subdivision (i). Both the right of the plaintiff to dismiss by filing a notice of dismissal and the right of the court to permit a dismissal are circumscribed to the extent that where the plaintiff has acquired the title or a lesser interest or possession, viz, any property interest for which just compensation should be paid, the action may not be dismissed, without the defendant's consent, and the property owner remitted to another court, such as the Court of Claims, to recover just compensation for the property right taken. Circuity of action is thus prevented without increasing the liability of the plaintiff to pay just compensation for any interest that is taken. Freedom of dismissal is accorded, where both the condemnor and condemnee agree, up to the time of the entry of judgment vesting plaintiff with title. And power is given to the court, where the parties agree, to vacate the judgment and thus revest title in the property owner. In line with Rule 21, the court may at any time drop a defendant who has been unnecessarily or improperly joined as where it develops that he has no interest.

Note to Subdivision (j). Whatever the substantive law is concerning the necessity of making a deposit will continue to govern. For statutory provisions concerning deposit in court in condemnation proceedings by the United States, see U.S.C., Title 40, § 258a; U.S.C., Title 33, § 594—acquisition of title and possession statutes referred to in note to subdivision (a), supra. If the plaintiff is invoking the state's power of eminent domain the necessity of deposit will be governed by the state law. For discussion of such law, see 1 Nichols, Eminent Domain, 2d ed. 1917, §§ 209-216. For discussion of the function of deposit and the power of the court to enter judgment in cases both of deficiency and overpayment, see *United States* v. *Miller,* 1943, 63 S.Ct. 276, 317 U.S. 369, 87 L.Ed. 336, 147 A.L.R. 55, rehearing denied, 63 S.Ct. 557, 318 U.S.

798, 87 L.Ed. 1162 (judgment in favor of plaintiff for overpayment ordered).

The court is to make distribution of the deposit as promptly as the facts of the case warrant. See also subdivision (c)(2).

Note to Subdivision (k). While the overwhelming number of cases that will be brought in the federal courts under this rule will be actions involving the federal power of eminent domain, a small percentage of cases may be instituted in the federal court or removed thereto on the basis of diversity or alienage which will involve the power of eminent domain under the law of a state. See *Boom Co.* v. *Patterson*, 1878, 98 U.S. 403, 25 L.Ed. 206; *Searl* v. *School District No. 2*, 1888, 8 S.Ct. 460, 124 U.S. 197, 31 L.Ed. 415; *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 1905, 25 S.Ct. 251, 196 U.S. 239, 49 L.Ed. 462. In the Madisonville case, and in cases cited therein, it has been held that condemnation actions brought by state corporations in the exercise of a power delegated by the state might be governed by procedure prescribed by the laws of the United States, whether the cases were begun in or removed to the federal court. See also *Franzen* v. *Chicago, M. & St. P. Ry. Co.*, C.C.A.7th, 1921, 278 F. 370, 372.

Any condition affecting the substantial right of a litigant attached by state law is to be observed and enforced, such as making a deposit in court where the power of eminent domain is conditioned upon so doing. (See also subdivision (j)). Subject to this qualification, subdivision (k) provides that in cases involving the state power of eminent domain, the practice prescribed by other subdivisions of Rule 71A shall govern.

Note to Subdivision (l). Since the condemnor will normally be the prevailing party and since he should not recover his costs against the property owner, Rule 54(d), which provides generally that costs shall go to the prevailing party, is made inapplicable. Without attempting to state what the rule on costs is, the effect of subdivision (l) is that costs shall be awarded in accordance with the law that has developed in condemnation cases. This has been summarized as follows: "Costs of condemnation proceedings are not assessable against the condemnee, unless by stipulation he agrees to assume some or all of them. Such normal expenses of the proceeding as bills for publication of notice, commissioners' fees, the cost of transporting commissioners and jurors to take a view, fees for attorneys to represent defendants who have failed to answer, and witness' fees, are properly charged to the government, though not taxed as costs. Similarly, if it is necessary that a conveyance be executed by a commissioner, the United States pay his fees and those for recording the deed. However, the distribution of the award is a matter in which the United States has no legal interest. Expenses incurred in ascertaining the identity of distributees and deciding between conflicting claimants are properly chargeable against the award, not against the United States, although United States attorneys are expected to aid the court in such matters as amici curiae." Lands Division Manual 861. For other discussion and citation, see *Grand River Dam Authority* v. *Jarvis*, C.C.A.10th, 1942, 124 F.2d 914. Costs may not be taxed against the United States except to the extent permitted by law. *United States* v. *125.71 Acres of Land in Loyalhanna Tp., Westmoreland County, Pa.*, D.C.Pa. 1944, 54 F.Supp. 193; Lands Division Manual 859. Even if it were thought desirable to allow the property owner's costs to be taxed against the United States, this is a matter for legislation and not court rule.

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

This amendment conforms to the amendment of Rule 4(f).

CROSS REFERENCES

Condemnation of property, right of Government officials, see section 257 of Title 40, Public Buildings, Property, and Works.

District of Columbia, procedure in condemnation proceedings, see D.C. Code, §§ 16-1351 to 16-1368

Jurisdiction and venue in condemnation proceedings, see sections 1358 and 1403 of this title.

Possession and title, taking in advance of final judgment, see sections 258a to 258f of Title 40, Public Buildings, Property, and Works.

Reclamation projects, compensation for rights-of-way, see section 945b of Title 43, Public Lands.

Tennessee Valley Authority, procedure in condemnation proceedings, see section 831x of Title 16, Conservation.

[Rules 72 to 76. Abrogated, Dec. 4, 1967, Effective July 1, 1968]

NOTES OF ADVISORY COMMITTEE ON RULES

These [Rules 72-76] are the civil rules relating to appeals, the provisions of which, except for Rule 73(h), are transferred to and covered by the Federal Rules of Appellate Procedure and (in the case of Rule 72) by the Rules of the Supreme Court. The substance of Rule 73(h) is to be transferred to Rule 9(h).

TITLE X—DISTRICT COURTS AND CLERKS

Rule 77. District Courts and Clerks

(a) District courts always open

The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(b) Trials and hearings; orders in chambers

All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.

(c) Clerk's office and orders by clerk

The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a district court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(d) Notice of orders or judgments

Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is suffi-

cient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule states the substance of U.S.C., Title 28, formerly § 13 (now § 452) (Courts open as courts of admiralty and equity). Compare former Equity Rules 1 (District Court Always Open For Certain Purposes—Orders at Chambers), 2 (Clerk's Office Always Open, Except, Etc.), 4 (Notice of Orders), and 5 (Motions Grantable of Course by Clerk).

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. Rule 77(d) has been amended to avoid such situations as the one arising in *Hill* v. *Hawes*, 1944, 320 U.S. 520. In that case, an action instituted in the District Court for the District of Columbia, the clerk failed to give notice of the entry of a judgment for defendant as required by Rule 77(d). The time for taking an appeal then was 20 days under Rule 10 of the Court of Appeals (later enlarged by amendment to thirty days), and due to lack of notice of the entry of judgment the plaintiff failed to file his notice of appeal within the prescribed time. On this basis the trial court vacated the original judgment and then reentered it, whereupon notice of appeal was filed. The Court of Appeals dismissed the appeal as taken too late. The Supreme Court, however, held that although Rule 77(d) did not purport to attach any consequence to the clerk's failure to give notice as specified, the terms of the rule were such that the appellant was entitled to rely on it, and the trial court in such a case, in the exercise of a sound discretion, could vacate the former judgment and enter a new one, so that the appeal would be within the allowed time.

Because of Rule 6(c), which abolished the old rule that the expiration of the term ends a court's power over its judgment, the effect of the decision in *Hill* v. *Hawes* is to give the district court power, in its discretion and without time limit, and long after the term may have expired, to vacate a judgment and reenter it for the purpose of reviving the right of appeal. This seriously affects the finality of judgments. See also proposed Rule 6(c) and Note; proposed Rule 60(b) and Note; and proposed Rule 73(a) and Note.

Rule 77(d) as amended makes it clear that notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry of judgment and not from the date of notice of the entry. Notification by the clerk is merely for the convenience of litigants. And lack of such notification in itself has no effect upon the time for appeal; but in considering an application for extension of time for appeal as provided in Rule 73(a), the court may take into account, as one of the factors affecting its decision, whether the clerk failed to give notice as provided in Rule 77(d) or the party failed to receive the clerk's notice. It need not, however, extend the time for appeal merely because the clerk's notice was not sent or received. It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment, or to rely on the adverse party's failure to serve notice of the entry of a judgment. Any party may, of course, serve timely notice of the entry of a judgment upon the adverse party and thus preclude a successful application, under Rule 73(a), for the extension of the time for appeal.

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

Subdivision (c). The amendment authorizes closing of the clerk's office on Saturday as far as civil business is concerned. However, a district court may require its clerk's office to remain open for specified hours on Saturdays or "legal holidays" other than those enumerated. ("Legal holiday" is defined in Rule 6(a), as amended.) The clerk's offices of many district courts have customarily remained open on some of the days appointed as holidays by State law. This practice could be continued by local rule or order.

Subdivision (d). This amendment conforms to the amendment of Rule 5(a). See the Advisory Committee's Note to that amendment.

NOTES OF ADVISORY COMMITTEE ON 1968 AMENDMENT TO RULES

The provisions of Rule 73(a) are incorporated in Rule 4(a) of the Federal Rules of Appellate Procedure.

NOTES OF ADVISORY COMMITTEE ON 1971 AMENDMENT TO RULES

The amendment adds Columbus Day to the list of legal holidays. See the Note accompanying the amendment of Rule 6(a).

REFERENCES IN TEXT

The Federal Rules of Appellate Procedure, referred to in text, are set out in the Appendix to this title.

CROSS REFERENCES

Books and records kept by clerk and entries therein, see rule 79.

Courts always open, see section 452 of this title.

Entry of default judgment by clerk, see rule 55.

Execution, see rule 69.

Service of papers on attorney or party, see rule 5.

FEDERAL RULES OF CRIMINAL PROCEDURE

Courts always open, see rule 56, Title 18, Appendix, Crimes and Criminal Procedure.

Rule 78. Motion Day

Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

NOTES OF ADVISORY COMMITTEE ON RULES

Compare former Equity Rule 6 (Motion Day) with the first paragraph of this rule. The second paragraph authorizes a procedure found helpful for the expedition of business in some of the Federal and State courts. See Rule 43(e) of these rules dealing with evidence on motions. Compare Civil Practice Rules of the Municipal Court of Chicago (1935), Rules 269, 270, 271.

CROSS REFERENCES

Local rules not to be inconsistent with these rules, see rule 83.

Motions and other papers, see rule 7.

Service of affidavits in support of and in opposition to motions, see rule 6.
Time for noticing motions, see rule 6.
Use of affidavits on motions, see rule 43.

FEDERAL RULES OF CRIMINAL PROCEDURE

Motions, see rules 45, 47, 49, Title 18, Appendix, Crimes and Criminal Procedure.

Rule 79. Books and Records Kept by the Clerk and Entries Therein

(a) Civil docket

The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

(b) Civil judgments and orders

The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

(c) Indices; calendars

Suitable indices of the civil docket and of every civil judgment and order referred to in subdivision (b) of this rule shall be kept by the clerk under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial, which shall distinguish "jury actions" from "court actions."

(d) Other books and records of the clerk

The clerk shall also keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

(As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

Compare Equity Rule 3 (Books Kept by Clerk and Entries Therein). In connection with this rule, see also the following statutes of the United States:

U.S.C., Title 5:
§ 301 (Officials for investigation of official acts, records and accounts of marshals, attorneys, clerks of courts, United States commissioners, referees and trustees)
§ 318 (Accounts of district attorneys)

U.S.C., Title 28, former:
§ 556 (Clerks of district courts; books open to inspection)
§ 567 (Same; accounts)
§ 568 (Same; reports and accounts of moneys received; dockets)
§ 813 (Indices of judgment debtors to be kept by clerks)

And see "Instructions to United States Attorneys, Marshals, Clerks and Commissioners" issued by the Attorney General of the United States.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. Subdivision (a). The amendment substitutes the Director of the Administrative Office of the United States Courts, acting subject to the approval of the Judicial Conference of Senior Circuit Judges, in the place of the Attorney General as a consequence of and in accordance with the provisions of the act establishing the Administrative Office and transferring functions thereto. Act of August 7, 1939, ch. 501, §§ 1-7, 53 Stat. 1223, 28 U.S.C. formerly §§ 444-450 (now §§ 601-610).

Subdivision (b). The change in this subdivision does not alter the nature of the judgments and orders to be recorded in permanent form but it does away with the express requirement that they be recorded in a book. This merely gives latitude for the preservation of court records in other than book form, if that shall seem advisable, and permits with the approval of the Judicial Conference and adoption of such modern, space-saving methods as microphotography. See Proposed Improvements in the Administration of the Offices of Clerks of United States District Courts, prepared by the Bureau of the Budget, 1941, 38-42. See also Rule 55, Federal Rules of Criminal Procedure [following section 687 of Title 18 U.S.C.].

Subdivision (c). The words "Separate and" have been deleted as unduly rigid. There is no sufficient reason for requiring that the indices in all cases be separate; on the contrary, the requirement frequently increases the labor of persons searching the records as well as the labor of the clerk's force preparing them. The matter should be left to administrative discretion.

The other changes in the subdivision merely conform with those made in subdivision (b) of the rule.

Subdivision (d). Subdivision (d) is a new provision enabling the Administrative Office, with the approval of the Judicial Conference, to carry out any improvements in clerical procedure with respect to books and records which may be deemed advisable. See report cited in Note to subdivision (b), supra.

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

The terminology is clarified without any change of the prescribed practice. See amended Rule 58, and the Advisory Committee's Note thereto.

AMENDMENTS

1948—The amendment effective October 1949 substituted the name, "Judicial Conference of the United States," for "Judicial Conference of Senior Circuit Judges," in the first sentence of subdivision (a), and in subdivisions (b) and (d).

CROSS REFERENCES

Entry of judgment, see rule 58.

Examination of court dockets by Director of Administrative Office of the United States Courts, see section 604 of this title.

Filing of pleading and other papers with clerk or judge, see rule 5.

Lien of judgment, see section 1962 of this title.

Notice of entry of judgment or order, see rule 77.

Obsolete papers disposed of in accordance with rules of Judicial Conference of the United States, see section 457 of this title.

Registration of judgments for money or property in other districts, see section 1963 of this title.

Return of execution of process, see rule 4.

Survey and recommendation of Judicial Conference of the United States, see section 331 of this title.

Time for serving demand for jury trial, see rule 38.

FEDERAL RULES OF CRIMINAL PROCEDURE

Notice of entry of orders by clerk, see rule 49, Title 18, Appendix, Crimes and Criminal Procedure.

Records, see rule 55.

Rule 80. Stenographer; Stenographic Report or Transcript as Evidence

[(a), (b) Abrogated]

(c) Stenographic report or transcript as evidence

Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

(As amended Dec. 27, 1946, eff. March 19, 1948.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). This follows substantially former Equity Rule 50 (Stenographer—Appointment—Fees). [This subdivision was abrogated. See amendment note of Advisory Committee below.]

Note to Subdivision (b). See Reports of Conferences of Senior Circuit Judges with the Chief Justice of the United States (1936), 22 A.B.A.J. 818, 819; (1937), 24 A.B.A.J. 75, 77. [This subdivision was abrogated. See amendment note of Advisory Committee below.]

Note to Subdivision (c). Compare Iowa Code (1935) § 11353.

NOTES OF ADVISORY COMMITTEE ON AMENDMENTS TO RULES

Note. Subdivisions (a) and (b) of Rule 80 have been abrogated because of Public Law 222, 78th Cong., ch. 3, 2d Sess., approved Jan. 20, 1944, 28 U.S.C. formerly § 9a (now §§ 550, 604, 753, 1915, 1920), providing for the appointment of official stenographers for each district court, prescribing their duties, providing for the furnishing of transcripts, the taxation of the fees therefor as costs and other related matters. This statute has now been implemented by Congressional appropriation available for the fiscal year beginning July 1, 1945.

Subdivision (c) of Rule 80 (Stenographic Report or Transcript as Evidence) has been retained unchanged.

CROSS REFERENCES

Appointment and compensation of court reporters, see section 753 of this title.

Fees for transcripts of court reporters, see section 753 of this title.

Fees of court reporter for stenographic transcript taxable as costs, see section 1920 of this title.

Payment by United States for fees for transcripts and printing record on appeal furnished persons proceeding in forma pauperis, see sections 753 and 1915 of this title.

Proof of official record, see rule 44.

TITLE XI—GENERAL PROVISIONS

Rule 81. Applicability in General

(a) To what proceedings applicable

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C. §§ 7651-7681. They do not apply to proceedings in bankruptcy or proceedings in copyright under Title 17, U.S.C., except insofar as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia.

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.

(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

(4) These rules do not alter the method prescribed by the Act of February 18, 1922, ch. 57, § 2 (42 Stat. 388), U.S.C., Title 7, § 292; or by the Act of June 10, 1930, ch. 436, § 7 (46 Stat. 534), as amended, U.S.C., Title 7, § 499g(c), for instituting proceedings in the United States district courts to review orders of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, ch. 742, § 2 (48 Stat. 1214), U.S.C., Title 15, § 522, for instituting proceedings to review orders of the Secretary of the Interior; or prescribed by the Act of February 22, 1935, ch. 18, § 5 (49 Stat. 31), U.S.C., Title 15, § 715d(c), as extended, for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules as far as applicable.

(5) These rules do not alter the practice in the United States district courts prescribed in the Act of July 5, 1935, ch. 372, §§ 9 and 10 (49 Stat. 453), as amended, U.S.C., Title 29, §§ 159 and 160, for beginning and conducting proceedings to enforce orders of the National Labor Relations Board; and in respects not covered by those statutes, the practice in the district courts shall conform to these rules so far as applicable.

(6) These rules apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Work-

ers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), as amended, U.S.C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act. The provisions for service by publication and for answer in proceedings to cancel certificates of citizenship under the Act of June 27, 1952, ch. 477, title III, ch. 2, § 340 (66 Stat. 260), U.S.C., Title 8, § 1451, remain in effect.

[(7) Abrogated, eff. Aug. 1, 1951. Supreme Court Order, April 30, 1951]

(b) Scire facias and mandamus

The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

(c) Removed actions

These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by him of trial by jury.

[(d) Abrogated, eff. Oct. 20, 1949. Supreme Court Order, Dec. 29, 1948]

(e) Law applicable

Whenever in these rules the law of the state in which the district court is held is made applicable, the law applied in the District of Columbia governs proceedings in the United States District Court for the District of Columbia. When the word "state" is used, it includes, if appropriate, the District of Columbia. When the term "statute of the United States" is used, it includes, so far as concerns proceedings in the United States District Court for the District of Columbia, any Act of Congress locally applicable to and in force in the District of Columbia. When the law of a state is referred to, the word "law" includes the statutes of that state and the state judicial decisions construing them.

(f) References to officer of the United States

Under any rule in which reference is made to an officer or agency of the United States, the term "officer" includes a district director of internal revenue, a former district director or collector of internal revenue, or the personal representative of a deceased district director or collector of internal revenue.

(As amended Dec. 28, 1939, eff. Apr. 3, 1941; Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). Paragraph (1): Compare the enabling act, act of June 19, 1934, U.S.C., Title 28, formerly § 723b (now § 2072) (Rules in actions at law; Supreme Court authorized to make) and formerly § 723c (now § 2072) (Union of equity and action at law rules; power of Supreme Court). For the application of these rules in bankruptcy and copyright proceedings, see Orders xxxvi and xxxvii in Bankruptcy and Rule 1 of Rules of Practice and Procedure under § 25 of the copyright act, act of March 4, 1909, U.S.C., Title 17, § 25 (now § 101) (Infringement and rules of procedure).

For examples of statutes which are preserved by paragraph (2) see: U.S.C., Title 8, ch. 9 (Naturalization); Title 28, former ch. 14 (Habeas corpus); Title 28, former §§ 377a-377c (Quo warranto); and such forfeiture statutes as U.S.C., Title 7, former § 116 (Misbranded seeds, confiscation), and Title 21, formerly § 14 (now § 334(b)) (Pure Food and Drug Act—condemnation of adulterated or misbranded food; procedure). See also *443 Cans of Frozen Eggs Product* v. *U.S.*, 226 U.S. 172, 33 S. Ct. 50, 57 L. Ed. 174 (1912).

For examples of statutes which under paragraph (7) will continue to govern procedure in condemnation cases, see U.S.C., Title 40, § 258 (Condemnation of realty for sites for public building, etc., procedure); U.S.C., Title 16, § 831x (Condemnation by Tennessee Valley Authority); U.S.C., Title 40, § 120 (Acquisition of lands for public use in District of Columbia); Title 40, ch. 7 (Acquisition of lands in District of Columbia for use of United States; condemnation).

Note to Subdivision (b). Some statutes which will be affected by this subdivision are:

U.S.C., Title 7:	
§ 222	(Federal Trade Commission powers adopted for enforcement of Stockyards Act) (By reference to Title 15, § 49)
U.S.C., Title 15:	
§ 49	(Enforcement of Federal Trade Commission orders and antitrust laws)
§ 77t(c)	(Enforcement of Securities and Exchange Commission orders and Securities Act of 1933)
§ 78u(f)	(Same; Securities Exchange Act of 1934)
§ 79r(g)	(Same; Public Utility Holding Company Act of 1935)
U.S.C., Title 16:	
§ 820	(Proceedings in equity for revocation or to prevent violations of license of Federal Power Commission licensee)
§ 825m/b	Mandamus to compel compliance with Federal Water Power Act, etc.)
U.S.C., Title 19:	
§ 1333(c)	(Mandamus to compel compliance with orders of Tariff Commission, etc.)

U.S.C., Title 28, former:
§ 377 (Power to issue writs)
§ 572 (Fees, attorneys, solicitors and proctors)
§ 778 (Death of parties; substitution of executor or administrator). Compare Rule 25 (a) (Substitution of parties; death), and the note thereto.

U.S.C., Title 33:
§ 495 (Removal of bridges over navigable waters)

U.S.C., Title 45:
§ 88 (Mandamus against Union Pacific Railroad Company)
§ 153(p) (Mandamus to enforce orders of Adjustment Board under Railway Labor Act)
§ 185 (Same; National Air Transport Adjustment Board) (By reference to § 153)

U.S.C., Title 47:
§ 11 (Powers of Federal Communications Commission)
§ 401(a) (Enforcement of Federal Communications Act and orders of Commission)
§ 406 (Same; compelling furnishing of facilities; mandamus)

U.S.C., Title 49:
§ 19a(*l*) (Mandamus to compel compliance with Interstate Commerce Act)
§ 20(9) (Jurisdiction to compel compliance with interstate commerce laws by mandamus)

For comparable provisions in state practice see Ill. Rev. Stat. (1937), ch. 110, § 179; Calif. Code Civ. Proc. (Deering, 1937) § 802.

Note to Subdivision (c). Such statutes as the following dealing with the removal of actions are substantially continued and made subject to these rules:

U.S.C., Title 28, former:
§ 71 (Removal of suits from state courts)
§ 72 (Same; procedure)
§ 73 (Same; suits under grants of land from different states)
§ 74 (Same; causes against persons denied civil rights)
§ 75 (Same; petitioner in actual custody of state court)
§ 76 (Same; suits and prosecutions against revenue officers)
§ 77 (Same; suits by aliens)
§ 78 (Same; copies of records refused by clerk of state court)
§ 79 (Same; previous attachment bonds or orders)
§ 80 (Same; dismissal or remand)
§ 81 (Same; proceedings in suits removed)
§ 82 (Same; record; filing and return)
§ 83 (Service of process after removal)

U.S.C., Title 28, formerly § 72 (now §§ 1446, 1447), *supra*, however, is modified by shortening the time for pleading in removed actions.

Note to Subdivision (e). The last sentence of this subdivision modifies U.S.C., Title 28, formerly § 725 (now § 1652) (Laws of States as rules of decision) in so far as that statute has been construed to govern matters of procedure and to exclude state judicial decisions relative thereto.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note to Subdivision (a). Despite certain dicta to the contrary, *Lynn* v. *United States*, C.C.A.5th, 1940, 110 F.2d 586; *Mount Tivy Winery, Inc.* v. *Lewis*, N.D.Cal. 1942, 42 F.Supp. 636, it is manifest that the rules apply to actions against the United States under the Tucker Act [28 U.S.C., formerly §§ 41(20), 250, 251, 254, 257, 258, 287, 289, 292, 761-765 (now §§ 791, 1346, 1401, 1402, 1491, 1493, 1496, 1501, 1503, 2071, 2072, 2411, 2412, 2501, 2506, 2509, 2510)]. See United States to use of *Foster Wheeler Corp.* v. *American Surety Co. of New York*, E.D.N.Y. 1939, 25 F.Supp. 700; *Boerner* v. *United States*, E.D.N.Y. 1939, 26 F.Supp. 769; *United States* v. *Gallagher*, C.C.A.9th, 1945, 151 F.2d 556. Rules 1 and 81 provide that the rules shall apply to all suits of a civil nature, whether cognizable as cases at law or in equity, except those specifically excepted; and the character of the various proceedings excepted by express statement in Rule 81, as well as the language of the rules generally, shows that the term "civil action" [Rule 2] includes actions against the United States. Moreover, the rules in many places expressly make provision for the situation wherein the United States is a party as either plaintiff or defendant. See Rules 4(d)(4), 12(a), 13(d), 25(d), 37(f), 39(c), 45(c), 54(d), 55(e), 62(e), and 65(c). In *United States* v. *Sherwood*, 1941, 312 U.S. 584, 61 S.Ct. 767, the Solicitor General expressly conceded in his brief for the United States that the rules apply to Tucker Act cases. The Solicitor General stated: "The Government, of course, recognizes that the Federal Rules of Civil Procedure apply to cases brought under the Tucker Act." (Brief for the United States, p. 31). Regarding *Lynn* v. *United States*, *supra*, The Solicitor General said: "In *Lynn* v. *United States* * * * the Circuit Court of Appeals for the Fifth Circuit went beyond the Government's contention there, and held that an action under the Tucker Act is neither an action at law nor a suit in equity and, seemingly, that the Federal Rules of Civil Procedure are, therefore, inapplicable. We think the suggestion is erroneous. Rules 4(d), 12(a), 39(c), and 55(e) expressly contemplate suits against the United States, and nothing in the enabling Act (48 Stat. 1064, 28 U.S.C. formerly §§ 723b, 723c (now § 2072)) suggests that the Rules are inapplicable to Tucker Act proceedings, which in terms are to accord with court rules and their subsequent modifications (Sec. 4, Act of March 3, 1887, 24 Stat. 505, 28 U.S.C., formerly § 761 (now §§ 2071, 2072))." (Brief for the United States, p. 31, n. 17.)

United States v. *Sherwood*, *supra*, emphasizes, however, that the application of the rules in Tucker Act cases affects only matters of procedure and does not operate to extend jurisdiction. See also Rule 82. In the Sherwood case, the New York Supreme Court, acting under § 795 of the New York Civil Practice Act, made an order authorizing Sherwood, as a judgment creditor, to maintain a suit under the Tucker Act to recover damages from the United States for breach of its contract with the judgment debtor, Kaiser, for construction of a post office building. Sherwood brought suit against the United States and Kaiser in the District Court for the Eastern District of New York. The question before the United States Supreme Court was whether a United States District Court had jurisdiction to entertain a suit against the United States wherein private parties were joined as parties defendant. It was contended that either the Federal Rules of Civil Procedure or the Tucker Act, or both, embodied the consent of the United States to be sued in litigations in which issues between the plaintiff and third persons were to be adjudicated. Regarding the effect of the Federal Rules, the Court declared that nothing in the rules, so far as they may be applicable in Tucker Act cases, authorized the maintenance of any suit against the United States to which it had not otherwise consented. The matter involved was not one of procedure but of jurisdiction, the limits of which were marked by the consent of the United States to be sued. The jurisdiction thus limited is unaffected by the Federal Rules of Civil Procedure.

Subdivision (a)(2). The added sentence makes it clear that the rules have not superseded the requirements of U.S.C. Title 28, formerly § 466 (now § 2253). *Schenk* v. *Plummer*, C.C.A. 9th 1940, 113 F. 2d 726.

For correct application of the rules in proceedings for forfeiture of property for violation of a statute of the United States, such as under U.S.C., Title 22, § 405 (seizure of war materials intended for unlawful export) or U.S.C., Title 21, § 334(b) (Federal Food, Drug, and Cosmetic Act; formerly Title 21, U.S.C. § 14,

Pure Food and Drug Act), see *Reynal* v. *United States*, C.C.A.5th, 1945, 153 F.2d 929; *United States* v. *108 Boxes of Cheddar Cheese*, S.D.Iowa 1943, 3 F.R.D. 40.

Subdivision (a)(3). The added sentence makes it clear that the rules apply to appeals from proceedings to enforce administrative subpoenas. See *Perkins* v. *Endicott Johnson Corp.*, C.C.A. 2d 1942; 128 F. 2d 208, aff'd on other grounds, 1943, 317 U.S. 501, 63 S. Ct. 339; *Walling* v. *News Printing, Inc.*, C.C.A. 3d, 1945, 148 F. 2d 57; *McCrone* v. *United States*, 1939, 307 U.S. 61, 59 S. Ct. 685. And, although the provision allows full recognition of the fact that the rigid application of the rules in the proceedings themselves may conflict with the summary determination desired, *Good year Tire & Rubber Co.* v. *National Labor Relations Board*, C.C.A. 6th, 1941, 122 F. 2d 450; *Cudahy Packing Co.* v. *National Labor Relations Board*, C.C.A. 10th, 1941, 117 F. 2d 692, it is drawn so as to permit application of any of the rules in the proceedings whenever the district court deems them helpful. See, e.g., *Peoples Natural Gas Co.* v. *Federal Power Commission*, App. D.C. 1942, 127 F. 2d 153, cert. den., 1942, 316 U.S. 700, 62 S. Ct. 1298; *Martin* v. *Chandis Securities Co.*, C.C.A. 9th, 1942, 128 F. 2d 731. Compare the application of the rules in summary proceedings in bankruptcy under General Order 37. See 1 Collier on Bankruptcy, 14th ed. by Moore and Oglebay, 326-327; 2 Collier, op. cit. supra, 1401-1402; 3 Collier, op. cit. supra, 228-231; 4 Collier, op. cit. supra, 1199-1202.

Subdivision (a)(6). Section 405 of U.S.C., Title 8 originally referred to in the last sentence of paragraph (6), has been repealed and former § 738 (now § 1451), U.S.C., Title 8, has been enacted in its stead. The last sentence of paragraph (6) has, therefore, been amended in accordance with this change. The sentence has also been amended so as to refer directly to the statute regarding the provision of time for answer, thus avoiding any confusion attendant upon a change in the statute.

That portion of subdivision (a)(6) making the rules applicable to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C. § 901 et seq.] was added by an amendment made pursuant to order of the Court, December 28, 1939, effective three months subsequent to the adjournment of the 76th Congress, January 3, 1941.

Subdivision (c). The change in subdivision (c) effects more speedy trials in removed actions. In some states many of the courts have only two terms a year. A case, if filed 20 days before a term, is returnable to that term, but if filed less than 20 days before a term, is returnable to the following term, which convenes six months later. Hence, under the original wording of Rule 81(c), where a case is filed less than 20 days before the term and is removed within a few days but before answer, it is possible for the defendant to delay interposing his answer or presenting his defenses by motion for six months or more. The rule as amended prevents this result.

Subdivision (f). The use of the phrase "the United States or an officer or agency thereof" in the rules (as e.g., in Rule 12(a) and amended Rule 73(a)) could raise the question of whether "officer" includes a collector of internal revenue, a former collector, or the personal representative of a deceased collector, against whom suits for tax refunds are frequently instituted. Difficulty might ensue for the reason that a suit against a collector or his representative has been held to be a personal action. *Sage* v. *United States*, 1919, 250 U.S. 33, 39 S.Ct. 415; *Smietanka* v. *Indiana Steel Co.*, 1921, 257 U.S. 1, 42 S.Ct. 1; *United States* v. *Nunnally Investment Co.*, 1942, 316 U.S. 258, 62 S.Ct. 1064. The addition of subdivision (f) to Rule 81 dispels any doubts on the matter and avoids further litigation.

NOTES OF ADVISORY COMMITTEE ON 1948 AMENDMENT TO RULES

The amendment effective October 1949 substituted the words "United States District Court" for the words "District Court of the United States" in the last sentence of subdivision (a)(1) and in the first and third sentences of subdivision (e). The amendment substituted the words "United States district courts" for "district courts of the United States" in subdivision (a)(4) and (5) and in the first sentence of subdivision (c).

The amendment effective October 20, 1949, also made the following changes:

In subdivision (a)(1), the reference to "Title 17, U.S.C." was substituted for the reference to "the Act of March 4, 1909, ch. 320, § 25 (35 Stat. 1081), as amended, U.S.C.; Title 17, § 25."

In subdivision (a)(2), the reference to "Title 28, U.S.C., § 2253" was substituted for "U.S.C., Title 28, § 466."

In subdivision (a)(3), the reference in the first sentence to "Title 9, U.S.C.," was substituted for "the Act of February 12, 1925, ch. 213 (43 Stat. 883), U.S.C., Title 9".

In subdivision (a)(5), the words "as amended" were inserted after the parenthetical citation of "(49 Stat. 453)," and after the citations of "Title 29, §§ 159 and 160," former references to subdivisions "(e), (g), and (i)" were deleted.

In subdivision (a)(6), after the words "These rules" at the beginning of the first sentence, the following words were deleted: "do not apply to proceedings under the Act of September 13, 1888, ch. 1015, § 13 (25 Stat. 479), as amended, U.S.C., Title 8, § 282, relating to deportation of Chinese; they". Also in the first sentence, after the parenthetical citation of "(44 Stat. 1434, 1436)," the words "as amended" were added. In the last sentence, the words "October 14, 1940, ch. 876, § 338 (54 Stat. 1158)" were inserted in lieu of the words "June 29, 1906, ch. 3592, § 15 (34 Stat. 601), as amended."

In subdivision (c), the word "all" originally appearing in the first sentence between the words "govern" and "procedure" was deleted. In the third sentence, the portion beginning with the words "20 days after the receipt" and including all the remainder of that sentence was substituted for the following language: "the time allowed for answer by the law of the state or within 5 days after the filing of the transcript of the record in the district court of the United States, whichever period is longer, but in any event within 20 days after the filing of the transcript". In the fourth or last sentence, after the words at the beginning of the sentence. "If at the time of removal all necessary pleadings have been," the word "served" was inserted in lieu of the word "filed," and the concluding words of the sentence, "petition for removal is filed if he is the petitioner," together with the final clause immediately following, were substituted for the words "record of the action is filed in the district court of the United States."

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

Subdivision (a)(4). This change reflects the transfer of functions from the Secretary of Commerce to the Secretary of the Interior made by 1939 Reorganization Plan No. II, § 4(e), 53 Stat. 1433.

Subdivision (a)(6). The proper current reference is to the 1952 statute superseding the 1940 statute.

Subdivision (c). Most of the cases have held that a party who has made a proper express demand for jury trial in the State court is not required to renew the demand after removal of the action. *Zakoscielny* v. *Waterman Steamship Corp.*, 16 F.R.D. 314 (D.Md. 1954); *Talley* v. *American Bakeries Co.*, 15 F.R.D. 391 (E.D.Tenn. 1954); *Rehrer* v. *Service Trucking Co.*, 15 F.R.D. 113 (D.Del. 1953); 5 Moore's Federal Practice ¶ 38.39[3] (2d ed. 1951); 1 Barron & Holtzoff, Federal Practice and Procedure § 132 (Wright ed. 1960). But there is some authority to the contrary. *Petsel* v. *Chicago, B. & Q.R. Co.*, 101 F.Supp. 1006 (S.D.Iowa 1951) *Nelson* v. *American Nat. Bank & Trust Co.*, 9 F.R.D. 680 (E.D.Tenn. 1950). The amendment adopts the preponderant view.

In order still further to avoid unintended waivers of jury trial, the amendment provides that where by State law applicable in the court from which the case is removed a party is entitled to jury trial without making an express demand, he need not make a demand after removal. However, the district court for calendar or other purposes may on its own motion direct the parties to state whether they demand a jury, and the court must make such a direction upon the request of any party. Under the amendment a district court may find it convenient to establish a routine practice of giving these directions to the parties in appropriate cases.

Subdivision (f). The amendment recognizes the change of nomenclature made by Treasury Dept. Order 150-26(2), 18 Fed. Reg. 3499 (1953).

As to a special problem arising under Rule 25 (Substitution of parties) in actions for refund of taxes, see the Advisory Committee's Note to the amendment of Rule 25(d), effective July 19, 1961; and 4 Moore's Federal Practice § 25.09 at 531 (2d ed. 1950).

NOTES OF ABVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

See Note to Rule 1, supra.

Statutory proceedings to forfeit property for violation of the laws of the United States, formerly governed by the admiralty rules, will be governed by the unified and supplemental rules. See Supplemental Rule A.

Upon the recommendation of the judges of the United States District Court for the District of Columbia, the Federal Rules of Civil Procedure are made applicable to probate proceedings in that court. The exception with regard to adoption proceedings is removed because the court no longer has jurisdiction of those matters; and the words "mental health" are substituted for "lunacy" to conform to the current characterization in the District.

The purpose of the amendment to paragraph (3) is to permit the deletion from Rule 73(a) of the clause "unless a shorter time is provided by law." The 10 day period fixed for an appeal under 45 U.S.C. § 159 is the only instance of a shorter time provided for appeals in civil cases. Apart from the unsettling effect of the clause, it is eliminated because its retention would preserve the 15 day period heretofore allowed by 28 U.S.C. § 2107 for appeals from interlocutory decrees in admiralty, it being one of the purposes of the amendment to make the time for appeals in civil and admiralty cases uniform under the unified rules. See Advisory Committee's Note to subdivision (a) of Rule 73.

NOTES OF ABVISORY COMMITTEE ON 1968 AMENDMENT TO RULES

The amendments eliminate inappropriate references to appellate procedure.

NOTES OF ABVISORY COMMITTEE ON 1971 AMENDMENT TO RULES

Title 28, U.S.C., § 2243 now requires that the custodian of a person detained must respond to an application for a writ of habeas corpus "within three days unless for good cause additional time, not exceeding twenty days, is allowed." The amendment increases to forty days the additional time that the district court may allow in habeas corpus proceedings involving persons in custody pursuant to a judgment of a state court. The substantial increase in the number of such proceedings in recent years has placed a considerable burden on state authorities. Twenty days has proved in practice too short a time in which to prepare and file the return in many such cases. Allowance of additional time should, of course, be granted only for good cause.

While the time allowed in such a case for the return of the writ may not exceed forty days, this does not mean that the state must necessarily be limited to that period of time to provide for the federal court the transcript of the proceedings of a state trial or plenary hearing if the transcript must be prepared after the habeas corpus proceeding has begun in the federal court.

EFFECTIVE DATE OF ABROGATION

Abrogation of par. (7) of subdivision (a) of this rule as effective August 1, 1951, see Effective Date note under Rule 71A.

CROSS REFERENCES

Antitrust Civil Process Act petitions, application of rules, see section 1314 of Title 15, Commerce and Trade.

Demand for jury trial, see rule 38.

Habeas corpus, see this title.

Power of court to issue writs, see section 1651 of this title.

Procedure before and after removal generally, see sections 1446 and 1447 of this title.

Scope of rules, see rule 1.

Virgin Islands, applicability of rules to district court for, see section 1615 of Title 48, Territories and Insular Possessions.

FEDERAL RULES OF CRIMINAL PROCEDURE

Application and exception, see rule 54, Title 18, Appendix, Crimes and Criminal Procedure.

COPYRIGHT RULES OF PRACTICE

Infringement of copyrights, applicability of rules in so far as not inconsistent, see rule 1, Title 17, Appendix, Copyrights.

Rule 82. Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C., §§ 1391-93.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ABVISORY COMMITTEE ON RULES

These rules grant extensive power of joining claims and counterclaims in one action, but, as this rule states, such grant does not extend federal jurisdiction. The rule is declaratory of existing practice under the former Federal Equity Rules with regard to such provisions as former Equity Rule 26 on Joinder of Causes of Action and former Equity Rule 30 on Counterclaims. Compare Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L.J. 393 (1936).

NOTES OF ABVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

Title 28, U.S.C. § 1391(b) provides: "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law." This provision cannot appropriately be applied to what were formerly suits in admiralty. The rationale of decisions holding it inapplicable rests largely on the use of the term "civil action"; i.e., a suit in admiralty is not a "civil action" within the statute. By virtue of the amendment to Rule 1, the provisions of Rule 2 convert suits in admiralty into civil actions. The added sentence is necessary to avoid an undesirable change in existing law with respect to venue.

AMENDMENTS

1948—The amendment effective October 1949 substituted the words "United States district courts" for "district courts of the United States".

Rule 83. Rules by District Courts

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule substantially continues U.S.C., Title 28, formerly § 731 (now § 2071) (Rules of practice in district courts) with the additional requirement that copies of such rules and amendments be furnished to the Supreme Court of the United States. See Equity Rule 79 (Additional Rules by District Court). With the last sentence compare United States Supreme Court Admiralty Rules (1920), Rule 44 (Right of Trial Courts To Make Rules of Practice) (originally promulgated in 1842).

CROSS REFERENCES

Rule-making power generally, see section 2071 of this title.

FEDERAL RULES OF CRIMINAL PROCEDURE

Local rules, see rule 57, Title 18, Appendix, Crimes and Criminal Procedure.

Rule 84. Forms

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

(As amended Dec. 27, 1946, eff. March 19, 1948.)

NOTES OF ADVISORY COMMITTEE ON RULES

In accordance with the practice found useful in many codes, provision is here made for a limited number of official forms which may serve as guides in pleading. Compare 2 Mass. Gen. Laws (Ter. Ed., 1932) ch. 231, § 147, Forms 1-47; English Annual Practice (1937) Appendix A to M, inclusive; Conn. Practice Book (1934) Rules, 47-68, pp. 123-427.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

Note. The amendment serves to emphasize that the forms contained in the Appendix of Forms are sufficient to withstand attack under the rules under which they are drawn, and that the practitioner using them may rely on them to that extent. The circuit courts of appeals generally have upheld the use of the forms as promoting desirable simplicity and brevity of statement. *Sierocinski* v. *E. I. DuPont DeNemours & Co.*, C.C.A. 3d, 1939, 103 F. 2d 843; *Swift & Co.* v. *Young*, C.C.A. 4th, 1939, 107 F. 2d 170; *Sparks* v. *England*, C.C.A. 8th, 1940, 113 F. 2d 579; *Ramsouer* v. *Midland Valley R. Co.*, C.C.A. 8th, 1943, 135 F. 2d 101. And the forms as a whole have met with widespread approval in the courts. See cases cited in 1 Moore's Federal Practice, 1938, Cum. Supplement § 8.07, under "Page 554"; see also Commentary, The Official Forms, 1941, 4 Fed. Rules Serv. 954. In Cook, "Facts" and "Statements of Fact", 1937, 4 U. Chi. L. Rev. 233, 245-246, it is said with reference to what is now Rule 84: "* * * pleaders in the federal courts are not to be left to guess as to the meaning of [the] language" in Rule 8 (a) regarding the form of the complaint. "All of which is as it should be. In no other way can useless litigation be avoided." Ibid. The amended rule will operate to discourage isolated results such as those found in *Washburn* v. *Moorman Mfg. Co.*, S. D. Cal. 1938, 25 F. Supp. 546; *Employers Mutual Liability Ins. Co. of Wisconsin* v. *Blue Line Transfer Co.*, W. D. Mo. 1941, 2 F.R.D. 121, 5 Fed. Rules Serv. 12e.235, Case 2.

FEDERAL RULES OF CRIMINAL PROCEDURE

Forms as illustrative and not mandatory, see rule 58, Title 18, Appendix, Crimes and Criminal Procedure.

Rule 85. Title

These rules may be known and cited as the Federal Rules of Civil Procedure.

FEDERAL RULES OF CRIMINAL PROCEDURE

Title, see rule 60, Title 18, Appendix, Crimes and Criminal Procedure.

Rule 86. Effective Date

(a) [Effective date of original rules]

These rules will take effect on the day which is 3 months subsequent to the adjournment of the second regular session of the 75th Congress, but if that day is prior to September 1, 1938, then these rules will take effect on September 1, 1938. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

(b) Effective date of amendments

The amendments adopted by the Supreme Court on December 27, 1946, and transmitted to the Attorney General on January 2, 1947, shall take effect on the day which is three months subsequent to the adjournment of the first regular session of the 80th Congress, but, if that day is prior to September 1, 1947, then these amendments shall take effect on September 1, 1947. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(Added Dec. 27, 1946, eff. Mar. 19, 1948.)

(c) Effective Date of amendments

The amendments adopted by the Supreme Court on December 29, 1948, and transmitted to the Attorney General on December 31, 1948, shall take effect on the day following the adjournment of the first regular session of the 81st Congress.

(Added Dec. 29, 1948, eff. Oct. 20, 1949.)

(d) Effective date of amendments

The amendments adopted by the Supreme Court on April 17, 1961, and transmitted to the Congress on April 18, 1961, shall take effect on July 19, 1961. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(Added Apr. 17, 1961, eff. July 19, 1961.)

(e) Effective date of amendments

The amendments adopted by the Supreme Court on January 21, 1963, and transmitted to the Congress on January 21, 1963 shall take effect on July 1, 1963. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(Added Jan. 21, 1963, and amended Mar. 18, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

See former Equity Rule 81 (These Rules Effective February 1, 1913—Old Rules Abrogated).

EFFECTIVE DATE OF 1966 AMENDMENT; TRANSMISSION TO CONGRESS; RESCISSION

Sections 2-4 of the Order of the Supreme Court, dated Feb. 28, 1966, 383 U.S. 1031, provided:

"2. That the foregoing amendments and additions to the Rules of Civil Procedure shall take effect on July 1, 1966, and shall govern all proceedings in actions brought thereafter and also in all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies.

"3. That the Chief Justice be, and he hereby is, authorized to transmit to the Congress the forcgoing amendments and additions to the Rules of Civil Procedure in accordance with the provisions of Title 28, U.S.C., §§ 2072 and 2073.

"4. That: (a) subdivision (c) of Rule 6 of the Rules of Civil Procedure for the United States District Courts promulgated by this court on Deeember 20, 1937, effective September 16, 1938; (b) Rule 2 of the Rules for Practice and Procedure under section 25 of An Act To amend and consolidate the Acts respecting copyright, approved March 4, 1909, promulgated by this court on June 1, 1909, effective July 1, 1909; and (c) the Rules of Practice in Admiralty and Maritime Cases, promulgated by this court on December 6, 1920, effective March 7, 1921, as revised, amended and supplemented be, and they hereby are, rescinded, effective July 1, 1966."

CROSS REFERENCES

All laws in conflict with these rules to be of no further force and effect, see section 2072 of this title.

FEDERAL RULES OF CRIMINAL PROCEDURE

Effective Date, see rule 59, Title 18, Appendix, Crimes and Criminal Procedure.

APPENDIX OF FORMS

(See Rule 84)

INTRODUCTORY STATEMENT

1. The following forms are intended for illustration only. They are limited in number. No attempt is made to furnish a manual of forms. Each form assumes the action to be brought in the Southern District of New York. If the district in which an action is brought has divisions, the division should be indicated in the caption.

2. Except where otherwise indicated each pleading, motion, and other paper should have a caption similar to that of the summons, with the designation of the particular paper substituted for the word "Summons". In the caption of the summons and in the caption of the complaint all parties must be named but in other pleadings and papers, it is sufficient to state the name of the first party on either side, with an appropriate indication of other parties. See Rules 4(b), 7(b)(2), and 10(a).

3. In Form 3 and the forms following, the words, "Allegation of jurisdiction," are used to indicate the appropriate allegation in Form 2.

4. Each pleading, motion, and other paper is to be signed in his individual name by at least one attorney of record (Rule 11). The attorney's name is to be followed by his address as indicated in Form 3. In forms following Form 3 the signature and address are not indicated.

5. If a party is not represented by an attorney, the signature and address of the party are required in place of those of the attorney.

Form 1. Summons

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File Number———

A. B., Plaintiff
v.
C. D., Defendant

Summons

To the above-named Defendant:

You are hereby summoned and required to serve upon———, plaintiff's attorney, whose address is————, answer to the complaint which is herewith served upon you, within 20 [1] days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

————————,
Clerk of Court.

[Seal of the U.S. District Court]

Dated————

[1] If the United States or an officer or agency thereof is a defendant, the time to be inserted as to it is 60 days.

(As amended Dec. 29, 1948, effective Oct. 20, 1949.)

(This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure)

Form 2. Allegation of jurisdiction

(a) Jurisdiction founded on diversity of citizenship and amount.

Plaintiff is a [citizen of the State of Connecticut] [1] [corporation incorporated under the laws of the State of Connecticut having its principal place of business in the State of Connecticut] and defendant is a corporation incorporated under the laws of the State of New York having its principal place of business in a State other than the State of Connecticut. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

(b) Jurisdiction founded on the existence of a Federal question and amount in controversy.

The action arises under [the Constitution of the United States, Article ——, Section ——]; [the ———Amendment to the Constitution of the United States, Section ———]; [the Act of ———, ——— Stat. ——— U.S.C., Title ———, § ———]; [the Treaty of the United States (here describe the treaty)], [2] as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

(c) Jurisdiction founded on the existence of a question arising under particular statutes.

The action arises under the Act of ———, ——— Stat. ———; U.S.C., Title ———, § ———, as hereinafter more fully appears.

(d) Jurisdiction founded on the admiralty or maritime character of the claim.

This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears. [If the pleader wishes to invoke the distinctively maritime procedures referred to in Rule 9(h), add the following or its substantial equivalent: This is an admiralty or maritime claim within the meaning of Rule 9(h).]

[1] Form for natural person.

[2] Use the appropriate phrase or phrases. The general allegation of the existence of a Federal question is ineffective unless the matters constituting the claim for relief as set forth in the complaint raise a Federal question.

(As amended Apr. 17, 1961, eff. July 19, 1961; Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE

1. Diversity of Citizenship. If the plaintiff is an assignee, he should allege such other facts of citizenship as will show that he is entitled to prosecute his action under U.S.C.A., Title 28, § 1332, formerly § 41(1).

2. Jurisdiction Founded on Some Fact Other Than Diversity of Citizenship. The allegation as to the matter in controversy may be omitted in any case where by law no jurisdictional amount is required. See for example, U.S.C.A., Title 28, former § 41(2)-(28).

3. Pleading Venue. Since improper venue is an affirmative dilatory defense, it is not necessary for plaintiff to include allegations showing the venue to be proper.

4. It is sufficient to allege that a corporation is incorporated in a particular state, there being, for jurisdictional purposes, a conclusive presumption that all of its members or stockholders are citizens of that State, *Marshall* v. *Baltimore and Ohio R.R.. Co.*, 1853, 16 How. 314; Henderson, Fosition of Foreign Corporations in American Constitutional Law (1918) 54-64.

NOTES OF ADVISORY COMMITTEE ON 1961 AMENDMENT TO RULES

1. *Diversity of citizenship.* U.S.C., Title 28, § 1332 (Diversity of citizenship; amount in controversy; costs), as amended by P.L. 85-554, 72 Stat. 415, July 25, 1958, states in subsection (c) that "For the purposes of this section and section 1441 of this title [removable actions], a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." Thus if the defendant corporation in Form 2(a) had its principal place of business in Connecticut, diversity of citizenship would not exist. An allegation regarding the principal place of business of each corporate party must be made in addition to an allegation regarding its place of incorporation.

2. *Jurisdictional amount.* U.S.C., Title 28, § 1331 (Federal question; amount in controversy; costs) and § 1332 (Diversity of citizenship; amount in controversy; costs), as amended by P.L. 85-554, 72 Stat. 415, July 25, 1958, require that the amount in controversy, exclusive of interest and costs, be in excess of $10,000. The allegation as to the amount in controversy may be omitted in any case where by law no jurisdictional amount is required. See, for example, U.S.C., Title 28, § 1338 (Patents, copyrights, trade-marks, and unfair competition), § 1343 (Civil rights and elective franchise).

3. *Pleading venue.* Since improper venue is a matter of defense, it is not necessary for plaintiff to include allegations showing the venue to be proper. See 1 Moore's Federal practice, par. 0.140 [1.-4] (2d ed. 1959).

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

Since the Civil Rules have not heretofore been applicable to proceedings in Admiralty (Rule 81(a)(1)), Form 2 naturally has not contained a provision for invoking the admiralty jurisdiction. The form has never purported to be comprehensive, as making provision for all possible grounds of jurisdiction; but a provision for invoking the admiralty jurisdiction is particularly appropriate as an incident of unification.

Certain distinctive features of the admiralty practice must be preserved in unification, just as certain dis-

tinctive characteristics of equity were preserved in the merger of law and equity in 1938. Rule 9(h) provides the device whereby, after unification, with its abolition of the distinction between civil actions and suits in admiralty, the pleader may indicate his choice of the distinctively maritime procedures, and designates those features that are preserved. This form illustrates an appropriate way in which the pleader may invoke those procedures. Use of this device is not necessary if the claim is cognizable only by virtue of the admiralty and maritime jurisdiction, nor if the claim is within the exclusive admiralty jurisdiction of the district court.

Omission of a statement such as this from the pleading indicates the pleader's choice that the action proceed as a conventional civil action, if this is jurisdictionally possible, without the distinctive maritime remedies and procedures. It should be remembered, however, that Rule 9(h) provides that a pleading may be amended to add or withdraw such an identifying statement subject to the principles stated in Rule 15.

Form 3. Complaint on a promissory note

1. Allegation of jurisdiction.

2. Defendant on or about June 1, 1935, executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on June 1, 1936 the sum of ——— dollars with interest thereon at the rate of six percent per annum].

3. Defendant owes to plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant for the sum of ——— dollars, interest, and cost.

Signed: ————————————,

Attorney for Plaintiff.

Address: ————————————

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES

1. The pleader may use the material in one of the three sets of brackets. His choice will depend upon whether he desires to plead the document verbatim, or by exhibit, or according to its legal effect.

2. Under the rules free joinder of claims is permitted. See rules 8(e) and 18. Consequently the claims set forth in each and all of the following forms may be joined with this complaint or with each other. Ordinarily each claim should be stated in a separate division of the complaint, and the divisions should be designated as counts successively numbered. In particular the rules permit alternative and inconsistent pleading. See Form 10.

NOTES OF ADVISORY COMMITTEE ON RULES

At various places, these Forms [Forms 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 18, 21] allege or refer to damages of "ten thousand dollars, interest, and costs," or the like. The Forms were written at a time when the jurisdictional amount in ordinary "diversity" and "Federal question" cases was an amount in excess of $3,000, exclusive of interest and costs, so the illustrative amounts set out in the Forms were adequate for jurisdictional purposes. However, U.S.C. Title 28, § 1331 (Federal question; amount in controversy; costs) and § 1332 (Diversity of citizenship; amount in controversy; costs), as amended by Pub. Law 85-554, 72 Stat. 415, July 25, 1958, now require that the amount in controversy, exclusive of interest and costs, be in excess of $10,000. Accordingly the Forms are misleading. They are amended at appropriate places by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader.

Form 4. Complaint on an account

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ——— dollars according to the account hereto annexed as Exhibit A.

Wherefore (etc. as in Form 3).

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 5. Complaint for goods sold and delivered

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ——— dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936 and December 1, 1936.

Wherefore (etc. as in Form 3).

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTE

This form may be used where the action is for an agreed price or for the reasonable value of the goods.

NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 6. Complaint for money lent

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ——— dollars for money lent by plaintiff to defendant on June 1, 1936.

Wherefore (etc. as in Form 3).

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 7. Complaint for money paid by mistake

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ——— dollars for money paid by plaintiff to defendant by mistake on June 1, 1936, under the following circumstances: [here state the circumstances with particularity—see Rule 9(b)].

Wherefore (etc. as in Form 3).

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 8. Complaint for money had and received.

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ——— dollars for money had and received from one G. H. on

June 1, 1936, to be paid by defendant to plaintiff.

Wherefore (etc. as in Form 3).

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 9. Complaint for negligence

1. Allegation of jurisdiction.

2. On June 1, 1936, in a public highway called Boyiston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against defendant in the sum of —— dollars and costs.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTE

Since contributory negligence is an affirmative defense the complaint need contain no allegation of due care of plaintiff.

NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 10. Complaint for negligence where plaintiff is unable to determine definitely whether the person responsible is C. D. or E. F. or whether both are responsible and where his evidence may justify a finding of wilfulness or of recklessness or of negligence

A. B., Plaintiff
v.
C. D. and E. F., Defendants
} *Complaint*

1. Allegation of jurisdiction.

2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant C. D. or defendant E. F., or both defendants C. D. and E. F. wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said highway.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against C. D. or against E. F. or against both in the sum of —— dollars and costs.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 11. Complaint for conversion

1. Allegation of jurisdiction.

2. On or about December 1, 1936, defendant converted to his own use ten bonds of the ———Company (here insert brief identification as by number and issue) of the value of —— dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of —— dollars, interest, and costs.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 12. Complaint for specific performance of contract to convey land

1. Allegation of jurisdiction.

2. On or about December 1, 1936, plaintiff and defendant entered into an agreement in writing a copy of which is hereto annexed as Exhibit A.

3. In accord with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

4. Plaintiff now offers to pay the purchase price.

Wherefore plaintiff demands (1) that defendant be required specifically to perform said agreement, (2) damages in the sum of one thousand dollars, and (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of —— dollars.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTE

Here, as in Form 3, plaintiff may set forth the contract verbatim in the complaint or plead it, as indicated, by exhibit, or plead it according to its legal effect. Furthermore, plaintiff may seek legal or equitable relief or both even though this was impossible under the system in operation before these rules.

NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 13. Complaint on claim for debt and to set aside fraudulent conveyance under Rule 18(h)

A. B., Plaintiff
v.
C. D. and E. F., Defendants
} *Complaint*

1. Allegation of jurisdiction.

2. Defendant C. D. on or about ——— executed and delivered to plaintiff a promissory note (in the following words and figures: (here set out the note verbatim)); [a copy of which is hereto annexed as Exhibit A]; [whereby defendant C. D. promised to pay to plaintiff or order on —— the sum of five thousand dollars with

interest thereon at the rate of ——— percent. per annum].

3. Defendant C. D. owes to plaintiff the amount of said note and interest.

4. Defendant C. D. on or about ——— conveyed all his property, real and personal (or specify and describe) to defendant E. F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above referred to.

Wherefore plaintiff demands:

(1) That plaintiff have judgment against defendant C. D. for ——— dollars and interest; (2) that the aforesaid conveyance to defendant E. F. be declared void and the judgment herein be declared a lien on said property; (3) that plaintiff have judgment against the defendants for costs.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 14. Complaint for negligence under Federal Employer's Liability Act

1. Allegation of jurisdiction.

2. During all the times herein mentioned defendant owned and operated in interstate commerce a railroad which passed through a tunnel located at ——— and known as Tunnel No. ———.

3. On or about June 1, 1936, defendant was repairing and enlarging the tunnel in order to protect interstate trains and passengers and freight from injury and in order to make the tunnel more conveniently usable for interstate commerce.

4. In the course of thus repairing and enlarging the tunnel on said day defendant employed plaintiff as one of its workmen, and negligently put plaintiff to work in a portion of the tunnel which defendant had left unprotected and unsupported.

5. By reason of defendant's negligence in thus putting plaintiff to work in that portion of the tunnel, plaintiff was, while so working pursuant to defendant's orders, struck and crushed by a rock, which fell from the unsupported portion of the tunnel, and was (here describe plaintiff's injuries).

6. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning ——— dollars per day. By these injuries he has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount of ——— dollars for medicine, medical attendance, and hospitalization.

Wherefore plaintiff demands judgment against defendant in the sum of ——— dollars and costs.

Form 15. Complaint for damages under Merchant Marine Act

1. Allegation of jurisdiction. [If the pleader wishes to invoke the distinctively maritime procedures referred to in Rule 9(h), add the following or its substantial equivalent: This is an admiralty or maritime claim within the meaning of Rule 9(h).]

2. During all the times herein mentioned defendant was the owner of the steamship ——— and used it in the transportation of freight for hire by water in interstate and foreign commerce.

3. During the first part of (month and year) at ——— plaintiff entered the employ of defendant as an able seaman on said steamship under seamen's articles of customary form for a voyage from ——— ports to the Orient and return at a wage of ——— dollars per month and found, which is equal to a wage of ——— dollars per month as a shore worker.

4. On June 1, 1936, said steamship was about ——— days out of the port of ——— and was being navigated by the master and crew on the return voyage to ——— ports. (Here describe weather conditions and the condition of the ship and state as in an ordinary complaint for personal injuries the negligent conduct of defendant.)

5. By reason of defendant's negligence in thus (brief statement of defendant's negligent conduct) and the unseaworthiness of said steamship, plaintiff was (here describe plaintiff's injuries).

6. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning ——— dollars per day. By these injuries he has been made incapable of any gainful activity; has suffered great physical and mental pain, and has incurred expense in the amount of ——— dollars for medicine, medical attendance, and hospitalization.

Wherefore plaintiff demands judgment against defendant in the sum of ——— dollars and costs.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

See Advisory Committee's Note to Form 2.

Form 16. Complaint for infringement of patent

1. Allegation of jurisdiction.

2. On May 16, 1934, United States Letters Patent No. —— were duly and legally issued to plaintiff for an invention in an electric motor; and since that date plaintiff has been and still is the owner of those Letters Patent.

3. Defendant has for a long time past been and still is infringing those Letters Patent by making, selling, and using electric motors embodying the patented invention, and will continue to do so unless enjoined by this court.

4. Plaintiff has placed the required statutory notice on all electric motors manufactured and sold by him under said Letters Patent, and has given written notice to defendant of his said infringement.

Wherefore plaintiff demands a preliminary and final injunction against continued infringement, an accounting for damages, and an assessment of interest and costs against defendant.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

The prayer for relief is amended to reflect the language of the present patent statute, Title 35, U.S.C., § 284 (Damages).

Form 17. Complaint for infringement of copyright and unfair competition

1. Allegation of jurisdiction.

2. Prior to March, 1936, plaintiff, who then was and ever since has been a citizen of the United States, created and wrote an original book, entitled ———

3. This book contains a large amount of material wholly original with plaintiff and is copyrightable subject matter under the laws of the United States.

4. Between March 2, 1936, and March 10, 1936, plaintiff complied in all respects with the Act of (give citation) and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said book, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "March 10, 1936, Class ———, No. ———."

5. Since March 10, 1936, said book has been published by plaintiff and all copies of it made by plaintiff or under his authority or license have been printed, bound, and published in strict conformity with the provisions of the Act of ——— and all other laws governing copyright.

6. Since March 10, 1936, plaintiff has been and still is the sole proprietor of all rights, title, and interest in and to the copyright in said book.

7. After March 10, 1936, defendant infringed said copyright by publishing and placing upon the market a book entitled ———, which was copied largely from plaintiff's copyrighted book, entitled ———.

8. A copy of plaintiff's copyrighted book is hereto attached as "Exhibit 1"; and a copy of defendant's infringing book is hereto attached as "Exhibit 2."

9. Plaintiff has notified defendant that defendant has infringed the copyright of plaintiff, and defendant has continued to infringe the copyright.

10. After March 10, 1936, and continuously since about ———, defendant has been publishing, selling and otherwise marketing the book entitled ———, and has thereby been engaging in unfair trade practices and unfair competition against plaintiff to plaintiff's irreparable damage.

Wherefore plaintiff demands:

(1) That defendant, his agents, and servants be enjoined during the pendency of this action and permanentiy from infringing said copyright of said plaintiff in any manner, and from publishing, selling, marketing or otherwise disposing of any copies of the book entitled ———.

(2) That defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement of said copyright and said unfair trade practices and unfair competition and to account for

(a) all gains, profits and advantages derived by defendant by said trade practices and unfair competition and

(b) all gains, profits, and advantages derived by defendant by his infringement of plaintiff's copyright or such damages as to the court shall appear proper within the provisions of the copyright statutes, but not less than two hundred and fifty dollars.

(3) That defendant be required to deliver up to be impounded during the pendency of this action all copies of said book entitled ——— in his possession or under his control and to deliver up for destruction all infringing copies and all plates, molds, and other matter for making such infringing copies.

(4) That defendant pay to plaintiff the costs of this action and reasonable attorney's fees to be allowed to the plaintiff by the court.

(5) That plaintiff have such other and further relief as is just.

AMENDMENTS

This form, as set out, incorporates amendments made at the same time certain rules of the Federal Rules of Civil Procedure were amended. See Rule 86(b) of such rules.

Form 18. Complaint for interpleader and declaratory relief

1. Allegation of jurisdiction.

2. On or about June 1, 1935, plaintiff issued to G. H. a policy of iife insurance whereby plaintiff promised to pay to K. L. as beneficiary the sum of —— dollars upon the death of G. H. The policy required the payment by G. H. of a stipulated premium on June 1, 1936, and annually thereafter as a condition precedent to its continuance in force.

3. No part of the premium due June 1, 1936, was ever paid and the policy ceased to have any force or effect on July 1, 1936.

4. Thereafter, on September 1, 1936, G. H. and K. L. died as the result of a collision between a locomotive and the automobile in which G. H. and K. L. were riding.

5. Defendant C. D. is the duly appointed and acting executor of the will of G. H.; defendant E. F. is the duly appointed and acting executor of the will of K. L.; defendant X. Y. claims to have been duly designated as beneficiary of said policy in place of K. L.

6. Each of defendants, D. C., E. F., and X. Y. is claiming that the above-mentioned policy was in full force and effect at the time of the death of G. H.; each of them is claiming to be the only person entitled to receive payment of the amount of the policy and has made demand for payment thereof.

7. By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy, if it was in force at the death of G. H.

Wherefore plaintiff demands that the court adjudge:

(1) That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

(2) That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

(3) That, if the court shall determine that said policy was in force at the death of G. H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy, and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

(4) That plaintiff recover its costs.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

Form 19. Motion to dismiss, presenting defenses of failure to state a claim, of lack of service of process, of improper venue, and of lack of jurisdiction under Rule 12(b)

The defendant moves the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the Southern District of New York, and (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M. N. and X. Y. hereto annexed as Exhibit A and Exhibit B respectively.

3. To dismiss the action on the ground that it is in the wrong district because (a) the jurisdiction of this court is invoked solely on the ground that the action arises under the Constitution and laws of the United States and (b) the defendant is a corporation incorporated under the laws of the State of Delaware and is not licensed to do or doing business in the Southern District of New York, all of which more clearly appears in the affidavits of K. L. and V. W. hereto annexed as Exhibit C and D respectively.

4. To dismiss the action on the ground that the court lacks jurisdiction because the amount actually in controversy is less than ten thousand dollars exclusive of interest and costs.

Signed:———————————
Attorney for Defendant.

Address:———————————

Notice of Motion.

To:———————————
Attorney for Plaintiff.

———————————

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at Room ——, United States Court House, Foley Square, City of New York, on the —— day of———, 193—, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Signed:———————————
Attorney for Defendant.

Address:———————————

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 17, 1961, eff. July 19, 1961.)

EXPLANATORY NOTES

1. The above motion and notice of motion may be combined and denominated Notice of Motion. See Rule 7(b).

2. As to paragraph 3, see U.S.C., Title 28, § 1391 (Venue generally), subsections (b) and (c).

3. As to paragraph 4, see U.S.C., Title 28, § 1331 (Federal question; amount in controversy; costs), as amended by P.L. 85-554, 72 Stat. 415, July 25, 1958, requiring that the amount in controversy, exclusive of interest and costs, be in excess of $10,000.

Form 20. Answer presenting defenses under Rule 12(b)

FIRST DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

If defendant is indebted to plaintiffs for the goods mentioned in the complaint, he is indebted to them jointly with G. H. G. H. is alive; is a citizen of the State of New York and a resident of this district, is subject to the jurisdiction of this court, as to both service of process and venue; can be made a party without depriving this court of jurisdiction of the present parties, and has not been made a party.

THIRD DEFENSE

Defendant admits the allegation contained in paragraphs 1 and 4 of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint; and denies each and every other allegation contained in the complaint.

FOURTH DEFENSE

The right of action set forth in the complaint did not accrue within six years next before the commencement of this action.

COUNTERCLAIM

(Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint. No statement of the grounds on which the court's jurisdiction depends need be made unless the counterclaim requires independent grounds of jurisdiction.)

CROSS-CLAIM AGAINST DEFENDANT M. N.

(Here set forth the claim constituting a cross-claim against defendant M. N. in the manner in which a claim is pleaded in a complaint. The statement of grounds upon which the court's jurisdiction depends need not be made unless the cross-claim requires independent grounds of jurisdiction.)

NOTE

The above form contains examples of certain defenses provided for in rule 12(b). The first defense challenges the legal sufficiency of the complaint. It is a substitute for a general demurrer or a motion to dismiss.

The second defense embodies the old plea in abatement; the decision thereon, however, may well provide under Rules 19 and 21 for the citing in of the party rather than an abatement of the action.

The third defense is an answer on the merits.

The fourth defense is one of the affirmative defenses provided for in Rule 8(c).

The answer also includes a counterclaim and a cross-claim.

REVISION

The explanatory note incorporates revisions made by the Advisory Committee at the same time amendments to certain rules of the Federal Rules of Civil Procedure were made. See also rule 12(b), as amended.

Form 21. Answer to complaint set forth in Form 8, with counterclaim for interpleader

DEFENSE

Defendant admits the allegations stated in paragraph 1 of the complaint; and denies the allegations stated in paragraph 2 to the extent set forth in the counterclaim herein.

COUNTERCLAIM FOR INTERPLEADER

1. Defendant received the sum of ——— dollars as a deposit from E. F.

2. Plaintiff has demanded the payment of such deposit to him by virtue of an assignment of it which he claims to have received from E. F.

3. E. F. has notified the defendant that he claims such deposit, that the purported assignment is not valid, and that he holds the defendant responsible for the deposit.

Wherefore defendant demands:

(1) That the court order E. F. to be made a party defendant to respond to the complaint and to this counterclaim.[1]

(2) That the court order the plaintiff and E. F. to interplead their respective claims.

(3) That the court adjudge whether the plaintiff or E. F. is entitled to the sum of money.

(4) That the court discharge defendant from all liability in the premises except to the person it shall adjudge entitled to the sum of money.

(5) That the court award to the defendant its costs and attorney's fees.

[1]Rule 13(h) provides for the court ordering parties to a counterclaim, but who are not parties to the original action, to be brought in as defendants.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

[Form 22. Superseded, eff. July 1, 1963]

Form 22 for motion to bring in third-party defendant, setting out as an exhibit summons and third-party complaint, and for notice of motion, was superseded by Forms 22-A and 22-B, setting out summons and complaint against third-party defendant, and motion to bring in third-party defendant, effective July 1, 1963. See Advisory Committee notes under Forms 22-A and 22-B.

Form 22-A. Summons and complaint against third-party defendant

United States District Court for the Southern District of New York

Civil Action, File Number ——

A. B., Plaintiff
v.
C. D., Defendant and Third-Party Plaintiff
v.
E. F., Third-Party Defendant
} *Summons*

To the above-named Third-Party Defendant:

You are hereby summoned and required to serve upon ———, plaintiff's attorney whose address is ———, and upon ———, who is attorney for C. D., defendant and third-party plaintiff, and whose address is ———, an answer to the third-party complaint which is herewith served upon you within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint. There is also served upon you herewith a copy of the complaint of the plaintiff which you may but are not required to answer.

———————,
Clerk of Court.

[Seal of District Court]
Dated ———————

United States District Court for the Southern District of New York

Civil Action, File Number ——

A. B., Plaintiff
v.
C. D., Defendant and Third-Party Plaintiff
v.
E. F., Third-Party Defendant
} *Third-Party Complaint*

1. Plaintiff A. B. has filed against defendant C. D. a complaint, a copy of which is hereto attached as "Exhibit A."

2. (Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D. The statement should be framed as in an original complaint.)

Wherefore C. D. demands judgment against third-party defendant E. F. for all sums[1] that may be adjudged against defendant C. D. in favor of plaintiff A. B.

Signed: ———————,
Attorney for C. D., Third-Party Plaintiff.
Address:———————

[1]Make appropriate change where C. D. is entitled to only partial recovery-over against E. F.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

Under the amendment of Rule 14(a), a defendant who files a third-party complaint not later than 10 days after serving his original answer need not obtain

leave of court to bring in the third-party defendant by service under Rule 4. Form 22-A is intended for use in these cases.

The changes in the form of summons reflect an earlier amendment of Rule 14(a), effective in 1948, making it permissive, rather than mandatory, for the third-party defendant to answer the plaintiff's complaint. See *Cooper* v. *D/S A/S Progress*, 188 F.Supp. 578 (E.D.Pa. 1960); 1A Barron & Holtzoff, Federal Practice and Procedure 696 (Wright ed. 1960).

Under the amendment of Rule 5(a) requiring, with certain exceptions, that papers be served upon all the parties to the action, the third-party defendant, even if he makes no answer to the plaintiff's complaint, is obliged to serve upon the plaintiff a copy of his answer to the third-party complaint. Similarly, the defendant is obliged to serve upon the plaintiff a copy of the summons and complaint against the third-party defendant.

Form 22-B. Motion to bring in third-party defendant

Defendant moves for leave, as third-party plaintiff, to cause to be served upon E. F. a summons and third-party complaint, copies of which are hereto attached as Exhibit X.

Signed: ———————————,

Attorney for Defendant C. D.

Address: ———————————

Notice of Motion

(Contents the same as in Form 19. The notice should be addressed to all parties to the action.)

EXHIBIT X

(Contents the same as in Form 22-A.)

(Added Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

Form 22-B is intended for use when, under amended Rule 14(a), leave of court is required to bring in a third-party defendant.

Form 23. Motion to Intervene as a Defendant Under Rule 24

(Based upon the complaint, Form 16)

United States District Court for the Southern District of New York

Civil Action, File Number ——

A. B., plaintiff
v.
C. D., defendant
E. F., applicant for intervention

Motion to intervene as a defendant

E. F. moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the ground that he is the manufacturer and vendor to the defendant, as well as to others, of the articles alleged in the complaint to be an infringement of plaintiff's patent, and as such has a defense to plaintiff's claim presenting both questions of law and of fact which are common to the main action.[1]

Signed: ———————————,

Attorney for E. F., Applicant for Intervention.

Address: ———————————

Notice of Motion

(Contents the same as in Form 19)

United States District Court for the Southern District of New York

Civil Action, File Number ——

A. B., plaintiff
v.
C. D., defendant
E. F., intervener

Intervener's Answer

FIRST DEFENSE

Intervener admits the allegations stated in paragraphs 1 and 4 of the complaint; denies the allegations in paragraph 3, and denies the allegations in paragraph 2 in so far as they assert the legality of the issuance of the Letter Patent to plaintiff.

SECOND DEFENSE

Plaintiff is not the first inventor of the articles covered by the Letters Patent specified in his complaint, since articles substantially identical in character were previously patented in Letters Patent granted to intervener on January 5, 1920.

Signed:———————————,

Attorney for E. F., Intervener.

Address: ———————————

[1]For other grounds of intervention, either of right or in the discretion of the court, see rule 24(a) and (b).

(As amended Dec. 29, 1948, eff. Oct. 20, 1949.)

Form 24. Motion for Production of Documents, etc., Under Rule 34

Plaintiff A. B. requests defendant C. D. to respond within —— days to the following requests:

(1) That defendant produce and permit plaintiff to inspect and to copy each of the following documents:

(Here list the documents either individually or by category and describe each of them.)

(Here state the time, place, and manner of making the inspection and performance of any related acts.)

(2) That defendant produce and permit plaintiff to inspect and to copy, test, or sample each of the following objects:

(Here list the objects either individually or by category and describe each of them.)

(Here state the time, place, and manner of making the inspection and performance of any related acts.)

(3) That defendant permit plaintiff to enter (here describe property to be entered) and to inspect and to photograph, test or sample (here describe the portion of the real property and the objects to be inspected).

(Here state the time, place, and manner of making the inspection and performance of any related acts.)

Signed: ———————————,

Attorney for Plaintiff.

Address: ———————————

(As amended Mar. 30, 1970, eff. July 1, 1970.)

NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

Form 24 is revised to accord with the changes made in Rule 34.

Form 25. Request for admission under Rule 36

Plaintiff A. B. requests defendant C. D. within ——— days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine.

(Here list the documents and describe each document.)

2. That each of the following statements is true.

(Here list the statements.)

Signed: ————————————,
Attorney for Plaintiff.

Address: ————————————

(As amended Dec. 27, 1946, eff. Mar. 19, 1948.)

Form 26. Allegation of reason for omitting party

When it is necessary, under Rule 19(c), for the pleader to set forth in his pleading the names of persons who ought to be made parties, but who are not so made, there should be an allegation such as the one set out below:

John Doe named in this complaint is not made a party to this action [because he is not subject to the jurisdiction of this court]; [because he cannot be made a party to this action without depriving this court of jurisdiction].

[Form 27. Abrogated. Dec. 4, 1967, eff. July 1, 1968]

NOTES OF ADVISORY COMMITTEE ON RULES

The form of notice of appeal is transferred to the Federal Rules of Appellate Procedure as Form 1.

Form 28. Notice: Condemnation

United States District Court for the Southern District of New York

Civil Action, File Number ——

United States of America, Plaintiff
v.
1,000 Acres of Land in [here insert a general location as "City of ——" or "County of ——"], John Doe et al., and Unknown Owners, Defendants
} *Notice*

To (here insert the names of the defendants to whom the notice is directed):

You are hereby notified that a complaint in condemnation has heretofore been filed in the office of the clerk of the United States District Court for the Southern District of New York, in the United States Court House in New York City, New York, for the taking (here state the interest to be acquired, as "an estate in fee simple") for use (here state briefly the use, "as a site for a post-office building") of the following described property in which you have or claim an interest.

(Here insert brief description of the property in which the defendants, to whom the notice is directed, have or claim an interest.)

The authority for the taking is (here state briefly, as "the Act of ——, —— Stat., ——, U.S.C., Title —— § ——".)[1]

You are further notified that if you desire to present any objection or defense to the taking of your property you are required to serve your answer on the plaintiff's attorney at the address herein designated within twenty days after ————————.[2]

Your answer shall identify the property in which you claim to have an interest, state the nature and extent of the interest you claim, and state all of your objections and defenses to the taking of your property. All defenses and objections not so presented are waived. And in case of your failure so to answer the complaint, judgment of condemnation of that part of the above-described property in which you have or claim an interest will be rendered.

But without answering, you may serve on the plaintiff's attorney a notice of appearance designating the property in which you claim to be interested. Thereafter you will receive notice of all proceedings affecting it. At the trial of the issue of just compensation, whether or not you have previously appeared or answered, you may present evidence as to the amount of the compensation to be paid for your property, and you may share in the distribution of the award.

Signed ————————————
United States Attorney.

Address ————————————

(Here state an address within the district where the United States Attorney may be served as "United States Court House, New York, N.Y.".)

Dated ———

[1] And where appropriate add a citation to any applicable Executive Order.

[2] Here insert the words "personal service of this notice upon you," if personal service is to be made pursuant to subdivision (d)(3)(i) of this rule [Rule 71A]; or, insert the date of the last publication of notice, if service by publication is to be made pursuant to subdivision (d)(3)(ii) of this rule.

(Added May 1, 1951, eff. Aug. 1, 1951.)

Form 29. Complaint: Condemnation

United States District Court for the Southern District of New York

Civil Action, File Number——

United States of America, Plaintiff
v.
1,000 Acres of Land in [here insert a general location as "City of ————" or "County of——"], John Doe et al., and Unknown Owners, Defendants
} *Complaint*

1. This is an action of a civil nature brought by the United States of America for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.[1]

2. The authority for the taking is (here state briefly, as "the Act of ——, —— Stat. ——, U.S.C., Title ——, § ——").[2]

3. The use for which the property is to be taken is (here state briefly the use, "as a site for a post-office building").

4. The interest to be acquired in the property is (here state the interest as "an estate in fee simple").

5. The property so to be taken is (here set forth a description of the property sufficient for its identification) or (described in Exhibit A hereto attached and made a part hereof).

6. The persons known to the plaintiff to have or claim an interest in the property [3] are:

(Here set forth the names of such persons and the interests claimed.) [4]

7. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff and on diligent inquiry have not been ascertained. They are made parties to the action under the designation "Unknown Owners."

Wherefore the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

Signed:——————————

United States Attorney.

Address ——————————

(Here state an address within the district where the United States Attorney may be served, as "United States Court House, New York, N. Y.".)

[1] If the plaintiff is not the United States, but is, for example, a corporation invoking the power of eminent domain delegated to it by the state, then this paragraph 1 of the complaint should be appropriately modified and should be preceded by a paragraph appropriately alleging federal jurisdiction for the action, such as diversity. See Form 2.

[2] And where appropriate add a citation to any applicable Executive Order.

[3] At the commencement of the action the plaintiff need name as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a particular piece of property the plaintiff must add as defendants all persons having or claiming an interest in that property whose names can be ascertained by an appropriate search of the records and also those whose names have otherwise been learned. See Rule 71A(c)(2).

[4] The plaintiff should designate, as to each separate piece of property, the defendants who have been joined as owners thereof or of some interest therein. See Rule 71A(c)(2).

(Added May 1, 1951, eff. Aug. 1, 1951.)

Form 30. Suggestion of death upon the record under Rule 25(a)(1)

A. B. [describe as a party, or as executor, administrator, or other representative or successor of C. D., the deceased party] suggests upon the record, pursuant to Rule 25(a)(1), the death of C. D. [describe as party] during the pendency of this action.

(Added Jan. 21, 1963, eff. July 1, 1963.)

Form 31. Judgment on jury verdict

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action, File Number ——

A. B., Plaintiff
v.
C. D., Defendant } *Judgment*

This action came on for trial before the Court and a jury, Honorable John Marshall, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

[that the plaintiff A. B. recover of the defendant C. D. the sum of ——, with interest thereon at the rate of — percent as provided by law, and his costs of action.]

[that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant C. D. recover of the plaintiff A. B. his costs of action.]

Dated at New York, New York, this —— day of ——, 19—.

——————————,

Clerk of Court.

(Added Jan. 21, 1963, eff. July 1, 1963.)

EXPLANATORY NOTE

1. This form is illustrative of the judgment to be entered upon the general verdict of a jury. It deals with the cases where there is a general jury verdict awarding the plaintiff money damages or finding for the defendant, but is adaptable to other situations of jury verdicts.

2. The clerk, unless the court otherwise orders, is required forthwith to prepare, sign, and enter the judgment upon a general jury verdict without awaiting any direction by the court. The form of the judgment upon a special verdict or a general verdict accompanied by answers to interrogatories shall be promptly approved by the court, and the clerk shall thereupon enter it. See Rule 58, as amended.

3. The rules contemplate a simple judgment promptly entered. See Rule 54(a). Every judgment shall be set forth on a separate document. See Rule 58, as amended.

4. Attorneys are not to submit forms of judgment unless directed in exceptional cases to do so by the court. See Rule 58, as amended.

Form 32. Judgment on decision by the court.

United States District Court for the Southern District of New York

Civil Action, File Number ——

A. B., Plaintiff
v.
C. D., Defendant } *Judgment*

This action came on for [trial] [hearing] before the Court, Honorable John Marshall, District Judge, presiding, and the issues having been duly [tried] [heard] and a decision having been duly rendered,

It is Ordered and Adjudged

[that the plaintiff A. B. recover of the defendant C. D. the sum of——, with interest thereon at the rate of—— percent as provided by law, and his costs of action.]

[that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant C. D. recover of the plaintiff A. B. his costs of action.]

Dated at New York, New York, this —— day of ——, 19—.

_____,

Clerk of Court.

(Added Jan. 21, 1963, eff. July I, 1963.)

EXPLANATORY NOTE

1. This form is illustrative of the judgment to be entered upon a decision of the court. It deals with the cases of decisions by the court awarding a party only money damages or costs, but is adaptable to other decisions by the court.

2. The clerk, unless the court otherwise orders, is required forthwith, without awaiting any direction of the court, to prepare, sign, and enter the judgment upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied. The form of the judgment upon a decision by the court granting other relief shall be promptly approved by the court, and the clerk shall thereupon enter it. See Rule 58, as amended.

3. See also paragraphs 3-4 of the Explanatory Note to Form 31.

SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

NOTES OF ADVISORY COMMITTEE ON RULES

The amendments to the Federal Rules of Civil Procedure to unify the civil and admiralty procedure, together with the Supplemental Rules for Certain Admiralty and Maritime Claims, completely superseded the Admiralty Rules, effective July 1, 1966. Accordingly, the latter were rescinded.

Rule A. Scope of Rules

These Supplemental Rules apply to the procedure in admiralty and maritime claims within the meaning of Rule 9(h) with respect to the following remedies:

(1) Maritime attachment and garnishment;

(2) Actions in rem;

(3) Possessory, petitory, and partition actions;

(4) Actions for exoneration from or limitation of liability.

These rules also apply to the procedure in statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not. Except as otherwise provided, references in these Supplemental Rules to actions in rem include such analogous statutory condemnation proceedings.

The general Rules of Civil Procedure for the United States District Courts are also applicable to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules.

(Added Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Certain distinctively maritime remedies must be preserved in unified rules. The commencement of an action by attachment or garnishment has heretofore been practically unknown in federal jurisprudence except in admiralty, although the amendment of Rule 4(e) effective July 1, 1963, makes available that procedure in accordance with state law. The maritime proceedmg in rem is unique, except as it has been emulated by statute, and is closely related to the substantive maritime law relating to liens. Arrest of the vessel or other maritime property is an historic remedy in controversies over title or right to possession, and in disputes among co-owners over the vessel's employment. The statutory right to limit liability is limited to owners of vessels, and has its own complexities. While the unified federal rules are generally applicable to these distinctive proceedings, certain special rules dealing with them are needed.

Arrest of the person and imprisonment for debt are not included because these remedies are not peculiarly maritime. The practice is not uniform but conforms to state law. See 2 Benedict § 286; 28 U.S.C., § 2007; FRCP 64, 69. The relevant provisions of Admiralty Rules 2, 3, and 4 are unnecessary or obsolete.

No attempt is here made to compile a complete and self-contained code governing these distinctively maritime remedies. The more limited objective is to carry forward the relevant provisions of the former Rules of Practice for Admiralty and Maritime Cases, modernized and revised to some extent but still in the context of history and precedent. Accordingly, these Rules are not to be construed as limiting or impairing the traditional power of a district court, exercising the admiralty and maritime jurisdiction, to adapt its procedures and its remedies in the individual case, consistently with these rules, to secure the just, speedy, and inexpensive determination of every action. (See *Swift & Co., Packers* v. *Compania Columbiana Del Caribe, S/A*, 339 U.S. 684, (1950); Rule 1). In addition, of course, the district courts retain the power to make local rules not inconsistent with these rules. See Rule 83; cf. Admiralty Rule 44.

Rule B. Attachment aud Garnishment: Special Provisions

(1) *When Available; Complaint, Affidavit, and Process.*—With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. When a verified complaint is supported by such an affidavit the clerk shall forthwith issue a summons and process of attachment and garnishment. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

(2) *Notice to Defendant.*—No judgment by default shall be entered except upon proof, which may be by affidavit, (a) that the plaintiff or the garnishee has given notice of the action to the defendant by mailing to him a copy of the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt, or (b) that the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4(d) or (i), or (c) that the plaintiff or the garnishee has made diligent efforts to give notice of the action to the defendant and has been unable to do so.

(3) *Answer.*—

(a) *By Garnishee.*—The garnishee shall serve his answer, together with answers to any interrogatories served with the complaint, within 20 days after service of process upon him. Interro-

gatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in his hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against him. If he admits any debts, credits, or effects, they shall be held in his hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court.

(b) *By Defendant.*—The defendant shall serve his answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.

(Added Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Subdivision (1)

This preserves the traditional maritime remedy of attachment and garnishment, and carries forward the relevant substance of Admiralty Rule 2. In addition, or in the alternative, provision is made for the use of similar state remedies made available by the amendment of Rule 4(e) effective July 1, 1963. On the effect of appearance to defend against attachment see Rule E(8).

The rule follows closely the language of Admiralty Rule 2. No change is made with respect to the property subject to attachment. No change is made in the condition that makes the remedy available. The rules have never defined the clause, "if the defendant shall not be found within the district," and no definition is attempted here. The subject seems one best left for the time being to development on a case-by-case basis. The proposal does shift from the marshal (on whom it now rests in theory) to the plaintiff the burden of establishing that the defendant cannot be found in the district.

A change in the context of the practice is brought about by Rule 4(f), which will enable summons to be served throughout the state instead of, as heretofore, only within the district. The Advisory Committee considered whether the rule on attachment and garnishment should be correspondingly changed to permit those remedies only when the defendant cannot be found within the state and concluded that the remedy should not be so limited.

The effect is to enlarge the class of cases in which the plaintiff may proceed by attachment or garnishment although jurisdiction of the person of the defendant may be independently obtained. This is possible at the present time where, for example, a corporate defendant has appointed an agent within the district to accept service of process but is not carrying on activities there sufficient to subject it to jurisdiction. (*Seawind Compania, S.A.* v. *Crescent Line, Inc.*, 320 F.2d 580 (2d Cir. 1963)), or where, though the foreign corporation's activities in the district are sufficient to subject it personally to the jurisdiction, there is in the district no officer on whom process can be served (*United States* v. *Cia. Naviera Continental, S.A.*, 178 F.Supp. 561, (S.D.N.Y. 1959)).

Process of attachment or garnishment will be limited to the district. See Rule E(3)(a).

Subdivision (2)

The former Admiralty Rules did not provide for notice to the defendant in attachment and garnishment proceedings. None is required by the principles of due process, since it is assumed that the garnishee or custodian of the property attached will either notify the defendant or be deprived of the right to plead the judgment as a defense in an action against him by the defendant. *Harris* v. *Balk*, 198 U.S. 215 (1905); *Pennoyer* v. *Neff*, 95 U.S. 714 (1878). Modern conceptions of fairness, however, dictate that actual notice be given to persons known to claim an interest in the property that is the subject of the action where that is reasonably practicable. In attachment and garnishment proceedings the persons whose interests will be affected by the judgment are identified by the complaint. No substantial burden is imposed on the plaintiff by a simple requirement that he notify the defendant of the action by mail.

In the usual case the defendant is notified of the pendency of the proceedings by the garnishee or otherwise, and appears to claim the property and to make his answer. Hence notice by mail is not routinely required in all cases, but only in those in which the defendant has not appeared prior to the time when a default judgment is demanded. The rule therefore provides only that no default judgment shall be entered except upon proof of notice, or of inability to give notice despite diligent efforts to do so. Thus the burden of giving notice is further minimized.

In some cases the plaintiff may prefer to give notice by serving process in the usual way instead of simply by mail. (Rule 4(d).) In particular, if the defendant is in a foreign country the plaintiff may wish to utilize the modes of notice recently provided to facilitate compliance with foreign laws and procedures (Rule 4(i)). The rule provides for these alternatives.

The rule does not provide for notice by publication because there is no problem concerning unknown claimants, and publication has little utility in proportion to its expense where the identity of the defendant is known.

Subdivision (3)

Subdivision (a) incorporates the substance of Admiralty Rule 36.

The Admiralty Rules were silent as to when the garnishee and the defendant were to answer. See also 2 Benedict ch. XXIV.

The rule proceeds on the assumption that uniform and definite periods of time for responsive pleadings should be substituted for return days (see the discussion under Rule C(6), below). Twenty days seems sufficient time for the garnishee to answer (cf. FRCP 12(a)), and an additional 10 days should suffice for the defendant. When allowance is made for the time required for notice to reach the defendant this gives the defendant in attachment and garnishment approximately the same time that defendants have to answer when personally served.

Rule C. Actions in Rem: Special Provisions

(1) *When Available.*—An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

(2) *Complaint.*—In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as

may be required by the statute pursuant to which the action is brought.

(3) *Process.*—Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest of the vessel or other property that is the subject of the action and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment.

(4) *Notice.*—No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, § 30, as amended.

(5) *Ancillary Process.*—In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

(6) *Claim and Answer; Interrogatories.*—The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve his answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that he is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

(Added Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Subdivision (1).

This rule is designed not only to preserve the proceeding in rem as it now exists in admiralty cases, but to preserve the substance of Admiralty Rules 13-18. The general reference to enforcement of any maritime lien is believed to state the existing law, and is an improvement over the enumeration in the former Admiralty Rules, which is repetitious and incomplete (e.g., there was no reference to general average). The reference to any maritime lien is intended to include liens created by state law which are enforceable in admiralty.

The main concern of Admiralty Rules 13-18 was with the question whether certain actions might be brought in rem or also, or in the alternative, in personam. Essentially, therefore, these rules deal with questions of substantive law, for in general an action in rem may be brought to enforce any maritime lien, and no action in personam may be brought when the substantive law imposes no personal liability.

These rules may be summarized as follows:

1. Cases in which the plaintiff may proceed in rem and/or in personam:
   a. Suits for seamen's wages;
   b. Suits by materialmen for supplies, repairs, etc.;
   c. Suits for pilotage;
   d. Suits for collision damages;
   e. Suits founded on mere maritime hypothecation;
   f. Suits for salvage.
2. Cases in which the plaintiff may proceed only in personam:
   a. Suits for assault and beating.
3. Cases in which the plaintiff may proceed only in rem:
   a. Suits on bottomry bonds.

The coverage is complete, since the rules omit mention of many cases in which the plaintiff may proceed in rem or in personam. This revision proceeds on the principle that it is preferable to make a general statement as to the availability of the remedies, leaving out conclusions on matters of substantive law. Clearly it is not necessary to enumerate the cases listed under Item 1, above, nor to try to complete the list.

The rule eliminates the provision of Admiralty Rule 15 that actions for assault and beating may be brought only in personam. A preliminary study fails to disclose any reason for the rule. It is subject to so many exceptions that it is calculated to receive rather than to inform. A seaman may sue in rem when he has been beaten by a fellow member of the crew so vicious as to render the vessel unseaworthy. The Rolph, 293 Fed. 269, aff'd 299 Fed. 52 (9th Cir. 1923), or where the theory of the action is that a beating by the master is a breach of the obligation under the shipping articles to treat the seaman with proper kindness. The David Evans, 187 Fed. 775 (D. Hawaii 1911); and a passenger may sue in rem on the theory that the assault is a breach of the contract of passage, The Western States, 159 Fed. 354 (2d Cir. 1908). To say that an action for money damages may be brought only in personam seems equivalent to saying that a maritime lien shall not exist; and that, in turn, seems equivalent to announcing a rule of substantive law rather than a rule of procedure. Dropping the rule will leave it to the courts to determine whether a lien exists as a matter of substantive law.

The specific reference to bottomry bonds is omitted because, as a matter of hornbook substantive law, there is no personal liability on such bonds.

Subdivision (2).

This incorporates the substance of Admiralty Rules 21 and 22.

Subdivision (3).

Derived from Admiralty Rules 10 and 37. The provision that the warrant is to be issued by the clerk is new, but is assumed to state existing law.

There is remarkably little authority bearing on Rule 37, although the subject would seem to be an important one. The rule appears on its face to have provided for a sort of ancillary process, and this may well be the case when tangible property, such as a vessel, is arrested, and intangible property such as freight is incidentally involved. It can easily happen, however, that the only property against which the action may be brought is intangible, as where the owner of a vessel under charter has a lien on subfreights. See 2 Bene-

dict § 299 and cases cited. In such cases it would seem that the order to the person holding the fund is equivalent to original process, taking the place of the warrant for arrest. That being so, it would also seem that (1) there should be some provision for notice, comparable to that given when tangible property is arrested, and (2) it should not be necessary, as Rule 37 provided, to petition the court for issuance of the process, but that it should issue as of course. Accordingly the substance of Rule 37 is included in the rule covering ordinary process, and notice will be required by Rule C(4). Presumably the rules omit any requirement of notice in these cases because the holder of the funds (e.g., the cargo owner) would be required on general principles (cf. *Harris* v. *Balk*, 198 U.S. 215 (1905) to notify his obligee (e.g., the charterer); but in actions in rem such notice seems plainly inadequate because there may be adverse claims to the fund (e.g., there may be liens against the subfreights for seamen's wages, etc.). Compare Admiralty Rule 9.

Subdivision (4).

This carries forward the notice provision of Admiralty Rule 10, with one modification. Notice by publication is too expensive and ineffective a formality to be routinely required. When, as usually happens, the vessel or other property is released on bond or otherwise there is no point in publishing notice; the vessel is freed from the claim of the plaintiff and no other interest in the vessel can be affected by the proceedings. If however, the vessel is not released, general notice is required in order that all persons, including unknown claimants, may appear and be heard, and in order that the judgment in rem shall be binding on all the world.

Subdivision (5).

This incorporates the substance of Admiralty Rule 9.

There are remarkably few cases dealing directly with the rule. In The George Prescott, 10 Fed. Cas. 222 (No. 5,339) (E.D.N.Y. 1865), the master and crew of a vessel libeled her for wages, and other lienors also filed libels. One of the lienors suggested to the court that prior to the arrest of the vessel the master had removed the sails, and asked that he be ordered to produce them. He admitted removing the sails and selling them, justifying on the ground that he held a mortgage on the vessel. He was ordered to pay the proceeds into court. Cf. *United States* v. *The Zarko*, 187 F.Supp. 371 (S.D.Cal. 1960), where an armature belonging to a vessel subject to a preferred ship mortgages was in possession of a repairman claiming a lien.

It is evident that, though the rule has had a limited career in the reported cases, it is a potentially important one. It is also evident that the rule is framed in terms narrower than the principle that supports it. There is no apparent reason for limiting it to ships and their appurtenances (2 Benedict § 299). Also, the reference to "third parties" in the existing rule seems unfortunate. In The George Prescott, the person who removed and sold the sails was a plaintiff in the action, and relief against him was just as necessary as if he had been a stranger.

Another situation in which process of this kind would seem to be useful is that in which the principal property that is the subject of the action is a vessel, but her pending freight is incidentally involved. The warrant of arrest, and notice of its service, should be all that is required by way of original process and notice; ancillary process without notice should suffice as to the incidental intangibles.

The distinction between Admiralty Rules 9 and 37 is not at once apparent, but seems to be this: Where the action was against property that could not be seized by the marshal because it is intangible, the original process was required to be similar to that issued against a garnishee, and general notice was required (though not provided for by the present rule; cf. Advisory Committee's Note to Rule C(3)). Under Admiralty Rule 9 property had been arrested and general notice had been given, but some of the property had been removed or for some other reason could not be arrested. Here no further notice was necessary.

The rule also makes provision for this kind of situation: The proceeding is against a vessel's pending freight only; summons has been served on the person supposedly holding the funds, and general notice has been given; it develops that another person holds all or part of the funds. Ancillary process should be available here without further notice.

Subdivision (6).

Adherence to the practice of return days seems unsatisfactory. The practice varies significantly from district to district. A uniform rule should be provided so that any claimant or defendant can readily determine when he is required to file or serve a claim or answer.

A virtue of the return-day practice is that it requires claimants to come forward and identify themselves at an early stage of the proceedings—before they could fairly be required to answer. The draft is designed to preserve this feature of the present practice by requiring early filing of the claim. The time schedule contemplated in the draft is closely comparable to the present practice in the Southern District of New York, where the claimant has a minimum of 8 days to claim and three weeks thereafter to answer.

This rule also incorporates the substance of Admiralty Rule 25. The present rule's emphasis on "the true and bona fide owner" is omitted, since anyone having the right to possession can claim (2 Benedict § 324).

REFERENCES IN TEXT

The act of June 5, 1920, ch. 250, § 30, referred to in subd. (4), is section 30 of act June 5, 1920, ch. 250, 41 Stat. 988, known as the "Ship Mortgage Act, 1920", which is classified generally to chapter 25 (§ 911 et seq.) of Title 46, Shipping. For complete classification of this Act to the Code, see section 984 of Title 46 and Tables volume.

Rule D. Possessory, Petitory and Partition Actions

In all actions for possession, partition, and to try title maintainable according to the course of the admiralty practice with respect to a vessel, in all actions so maintainable with respect to the possession of cargo or other maritime property, and in all actions by one or more part owners against the others to obtain security for the return of the vessel from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the vessel for any voyage on giving security for its safe return, the process shall be by a warrant of arrest of the vessel, cargo, or other property, and by notice in the manner provided by Rule B(2) to the adverse party or parties.

(Added Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

This carries forward the substance of Admiralty Rule 19.

Rule 19 provided the remedy of arrest in controversies involving title and possession in general. See The Tilton, 23 Fed. Cas. 1277 (No. 14, 054) (C.C.D. Mass. 1830). In addition it provided that remedy in controversies between co-owners respecting the employment of a vessel. It did not deal comprehensively with controversies between co-owners, omitting the remedy of partition. Presumably the omission is traceable to the fact that, when the rules were originally promulgated, concepts of substantive law (sometimes stated as concepts of jurisdiction) denied the remedy of partition except where the parties in disagreement were the owners of equal shares. See The Steamboat Orleans, 36 U.S. (11 Pet.) 175 (1837). The Supreme Court has now removed any doubt as to the jurisdiction of the district courts to partition a vessel, and has held in addition that no fixed principle of federal admiralty law limits the remedy to the case of equal shares. *Madruga* v. *Superior Court*, 346 U.S. 556 (1954). It is

therefore appropriate to include a reference to partition in the rule.

Rule E. Actions in Rem and Quasi in Rem: General Provisions

(1) *Applicability.*—Except as otherwise provided, this rule applies to actions in personam with process of maritime attachment and garnishment, actions in rem, and petitory, possessory, and partition actions, supplementing Rules B, C, and D.

(2) *Complaint; Security.*—

(*a*) *Complaint.* In actions to which this rule is applicable the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

(*b*) *Security for Costs.* Subject to the provisions of Rule 54(d) and of relevant statutes, the court may on the filing of the complaint or on the appearance of any defendant, claimant, or any other party, or at any later time, require the plaintiff, defendant, claimant, or other party to give security, or additional security, in such sum as the court shall direct to pay all costs and expenses that shall be awarded against him by any interlocutory order or by the final judgment, or on appeal by any appellate court.

(3) *Process.*—

(*a*) *Territorial Limits of Effective Service.* Process in rem and of maritime attachment and garnishment shall be served only within the district.

(*b*) *Issuance and Delivery.* Issuance and delivery of process in rem, or of maritime attachment and garnishment, shall be held in abeyance if the plaintiff so requests.

(4) *Execution of Process; Marshal's Return: Custody of Property.*—

(*a*) *In General.* Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

(*b*) *Tangible Property.* If tangible property is to be attached or arrested, the marshal shall take it into his possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal shall execute the process by affixing a copy thereof to the property in a conspicuous place and by leaving a copy of the complaint and process with the person having possession or his agent. In furtherance of his custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until notified by the marshal or his deputy or by the clerk that the vessel has been released in accordance with these rules.

(*c*) *Intangible Property.* If intangible property is to be attached or arrested the marshal shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and process requiring him to answer as provided in Rules B(3)(a) and C(6); or he may accept for payment into the registry of the court the amount owed to the extent of the amount claimed by the plaintiff with interest and costs, in which event the garnishee or other obligor shall not be required to answer unless alias process shall be served.

(*d*) *Directions With Respect to Property in Custody.* The marshal may at any time apply to the court for directions with respect to property that has been attached or arrested, and shall give notice of such application to any or all of the parties as the court may direct.

(*e*) *Expenses of Seizing and Keeping Property; Deposit.* These rules do not alter the provisions of Title 28, U.S.C., § 1921, as amended, relative to the expenses of seizing and keeping property attached or arrested and to the requirement of deposits to cover such expenses.

(5) *Release of Property.*—

(*a*) *Special Bond.* Except in cases of seizures for forfeiture under any law of the United States, whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisement, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

(*b*) *General Bond.* The owner of any vessel may file a general bond or stipulation, with sufficient surety, to be approved by the court, conditioned to answer the judgment of such court in all or any actions that may be brought thereafter in such court in which the vessel is attached or arrested. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by plaintiffs in all actions begun and pending in which such vessel has been attached or arrested. Judgments and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such actions. The district court may make necessary orders to carry this rule into effect, particularly as to the giving of proper notice of any action against or attachment of a vessel for which a general bond has been filed. Such bond or stipulation shall be indorsed by the clerk with a minute of the actions wherein process is so stayed. Further security may be required by the court at any time.

If a special bond or stipulation is given in a particular case, the liability on the general bond or stipulation shall cease as to that case.

(*c*) *Release by Consent or Stipulation; Order of Court or Clerk; Costs.* Any vessel, cargo, or other property in the custody of the marshal may be released forthwith upon his acceptance

and approval of a stipulation, bond, or other security, signed by the party on whose behalf the property is detained or his attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal or other officer of the court shall be released without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action; but the marshal shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid.

(*d*) *Possessory, Petitory, and Partition Actions.* The foregoing provisions of this subdivision (5) do not apply to petitory, possessory, and partition actions. In such cases the property arrested shall be released only by order of the court, on such terms and conditions and on the giving of such security as the court may require.

(6) *Reduction or Impairment of Security.*—Whenever security is taken the court may, on motion and hearing, for good cause shown, reduce the amount of security given; and if the surety shall be or become insufficient, new or additional sureties may be required on motion and hearing.

(7) *Security on Counterclaim.*—Whenever there is asserted a counterclaim arising out of the same transaction or occurrence with respect to which the action was originally filed, and the defendant or claimant in the original action has given security to respond in damages, any plaintiff for whose benefit such security has been given shall give security in the usual amount and form to respond in damages to the claims set forth in such counterclaim, unless the court, for cause shown, shall otherwise direct; and proceedings on the original claim shall be stayed until such security is given, unless the court otherwise directs. When the United States or a corporate instrumentality thereof as defendant is relieved by law of the requirement of giving security to respond in damages it shall nevertheless be treated for the purposes of this subdivision E(7) as if it had given such security if a private person so situated would have been required to give it.

(8) *Restricted Appearance.*—An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment whether pursuant to these Supplemental Rules or to Rule 4(e), may be expressly restricted to the defense of such claim, and in that event shall not constitute an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

(9) *Disposition of Property; Sales.*—

(*a*) *Actions for Forfeitures.* In any action in rem to enforce a forfeiture for violation of a statute of the United States the property shall be disposed of as provided by statute.

(*b*) *Interlocutory Sales.* If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, on motion of the defendant or claimant, order delivery of the property to him, upon the giving of security in accordance with these rules.

(*c*) *Sales; Proceeds.* All sales of property shall be made by the marshal or his deputy, or other proper officer assigned by the court where the marshal is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

(Added Feb. 28, 1966, eff. July 1, 1966.)

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Subdivisions (1), (2).

Adapted from Admiralty Rule 24. The rule is based on the assumption that there is no more need for security for costs in maritime personal actions than in civil cases generally, but that there is reason to retain the requirement for actions in which property is seized. As to proceedings for limitation of liability see Rule F(1).

Subdivision (3).

The Advisory Committee has concluded for practical reasons that process requiring seizure of property should continue to be served only within the geographical limits of the district. Compare Rule B(1), continuing the condition that process of attachment and garnishment may be served only if the defendant is not found within the district.

The provisions of Admiralty Rule 1 concerning the persons by whom process is to be served will be superseded by FRCP 4(c).

Subdivision (4).

This rule is intended to preserve the provisions of Admiralty Rules 10 and 36 relating to execution of process, custody of property, seized by the marshal, and the marshal's return. It is also designed to make express provision for matters not heretofore covered.

The provision relating to clearance in subdivision (b) is suggested by Admiralty Rule 44 of the District of Maryland.

Subdivision (d) is suggested by English Rule 12, Order 75.

28 U.S.C. § 1921 as amended in 1962 contains detailed provisions relating to the expenses of seizing and preserving property attached or arrested.

Subdivision (5).

In addition to Admiralty Rule 11 (see Rule E(9), the release of property seized on process of attachment or in rem was dealt with by Admiralty Rules 5, 6, 12, and 57, and 28 U.S.C., § 2464 (formerly Rev. Stat. § 941). The rule consolidates these provisions and makes them uniformly applicable to attachment and garnishment and actions in rem.

The rule restates the substance of Admiralty Rule 5. Admiralty Rule 12 dealt only with ships arrested on in rem process. Since the same ground appears to be covered more generally by 28 U.S.C., § 2464, the subject matter of Rule 12 is omitted. The substance of Admiralty Rule 57 is retained. 28 U.S.C., § 2464 is incorporated with changes of terminology, and with a substantial change as to the amount of the bond. See 2 Benedict 395 n. 1a; The Lotosland, 2 F. Supp. 42 (S.D.N.Y. 1933). The provision for general bond is enlarged to include the contingency of attachment as well as arrest of the vessel.

Subdivision (6).

Adapted from Admiralty Rule 8.

Subdivision (7).

Derived from Admiralty Rule 50.

Title 46, U.S.C., § 783 extends the principle of Rule 50 to the Government when sued under the Public Vessels Act, presumably on the theory that the credit of the Government is the equivalent of the best security. The rule adopts this principle and extends it to all cases in which the Government is defendant although the Suits in Admiralty Act contains no parallel provisions.

Subdivision (8).

Under the liberal joinder provisions of unified rules the plaintiff will be enabled to join with maritime actions in rem, or maritime actions in personam with process of attachment and garnishment, claims with respect to which such process is not available, including nonmaritime claims. Unification should not, however, have the result that, in order to defend against an admiralty and maritime claim with respect to which process in rem or quasi in rem has been served, the claimant or defendant must subject himself personally to the jurisdiction of the court with reference to other claims with respect to which such process is not available or has not been served, especially when such other claims are nonmaritime. So far as attachment and garnishment are concerned this principle holds true whether process is issued according to admiralty tradition and the Supplemental Rules or according to Rule 4(e) as incorporated by Rule B(1).

A similar problem may arise with respect to civil actions other than admiralty and maritime claims within the meaning of Rule 9(h). That is to say, in an ordinary civil action, whether maritime or not, there may be joined in one action claims with respect to which process of attachment and garnishment is available under state law and Rule 4(e) and claims with respect to which such process is not available or has not been served. The general Rules of Civil Procedure do not specify whether an appearance in such cases to defend the claim with respect to which process of attachment and garnishment has issued is an appearance for the purposes of the other claims. In that context the question has been considered best left to case-by-case development. Where admiralty and maritime claims within the meaning of Rule 9(h) are concerned, however, it seems important to include a specific provision to avoid an unfortunate and unintended effect of unification. No inferences whatever as to the effect of such an appearance in an ordinary civil action should be drawn from the specific provision here and the absence of such a provision in the general Rules.

Subdivision (9).

Adapted from Admiralty Rules 11, 12, and 40. Subdivision (a) is necessary because of various provisions as to disposition of property in forfeiture proceedings. In addition to particular statutes, note the provisions of 28 U.S.C., §§ 2461-65.

The provision of Admiralty Rule 12 relating to unreasonable delay was limited to ships but should have broader application. See 2 Benedict 404. Similarly, both Rules 11 and 12 were limited to actions in rem, but should equally apply to attached property.

Rule F. Limitation of Liability

(1) *Time for Filing Complaint; Security.*—Not later than six months after his receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of his interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at his option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, his interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The plaintiff shall also give security for costs and, if he elects to give security, for interest at the rate of 6 per cent per annum from the date of the security.

(2) *Complaint.*—The complaint shall set forth the facts on the basis of which the right to limit liability is asserted, and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage, if any, on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer his interest in the vessel to a trustee, the complaint must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

(3) *Claims Against Owner; Injunction.*—Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or his property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or his property with respect to any claim subject to limitation in the action.

(4) *Notice to Claimants.*—Upon the owner's compliance with subdivision (1) of this rule the court shall issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice. For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for the filing of claims. The plaintiff not later than the day of second publication shall also mail a copy of the notice to every person known to

have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice shall be mailed to the decedent at his last known address, and also to any person who shall be known to have made any claim on account of such death.

(5) *Claims and Answer.*—Claims shall be filed and served on or before the date specified in the notice provided for in subdivision (4) of this rule. Each claim shall specify the facts upon which the claimant relies in support of his claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability he shall file and serve an answer to the complaint unless his claim has included an answer.

(6) *Information to be Given Claimants.*—Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall mail to the attorney for each claimant (or if the claimant has no attorney to the claimant himself) a list setting forth (a) the name of each claimant, (b) the name and address of his attorney (if he is known to have one), (c) the nature of his claim, i.e., whether property loss, property damage, death, personal injury, etc., and (d) the amount thereof.

(7) *Insufficiency of Fund or Security.*—Any claimant may by motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and, after notice and hearing, the court may similarly order that the deposit or security be increased or reduced.

(8) *Objections to Claims: Distribution of Fund.*—Any interested party may question or controvert any claim without filing an objection thereto. Upon determination of liabllity the fund deposited or secured, or the proceeds of the vessel and pending freight, shall be divided pro rata, subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priority to which they may be legally entitled.

(9) *Venue; Transfer.*—The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is wrongly laid the court shall dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought. If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules.

(Added Feb. 28, 1966, eff. July 1, 1966.)

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Subdivision (1).

The amendments of 1936 to the Limitation Act superseded to some extent the provisions of Admiralty Rule 51, especially with respect to the time of filing the complaint and with respect to security. The rule here incorporates in substance the 1936 amendment of the Act (46 U.S.C., § 185) with a slight modification to make it clear that the complaint may be filed at any time not later than six months after a claim has been lodged with the owner.

Subdivision (2).

Derived from Admiralty Rules 51 and 53.

Subdivision (3).

This is derived from the last sentence of 36 U.S.C. § 185 and the last paragraph of Admiralty Rule 51.

Subdivision (4).

Derived from Admiralty Rule 51.

Subdivision (5).

Derived from Admiralty Rules 52 and 53.

Subdivision (6).

Derived from Admiralty Rule 52.

Subdivision (7).

Derived from Admiralty Rule 52 and 46 U.S.C., § 185.

Subdivision (8).

Derived from Admiralty Rule 52.

Subdivision (9).

Derived from Admiralty Rule 54. The provision for transfer is revised to conform closely to the language of 28 U.S.C. §§ 1404(a) and 1406(a), though it retains the existing rule's provision for transfer to any district for convenience. The revision also makes clear what has been doubted: that the court may transfer if venue is wrongly laid.